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Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC., ET AL.,
PETITIONERS,

vs.

J. EDWARD DAY, POSTMASTER GENERAL
OF THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 29, 1961
CERTIORARI GRANTED OCTOBER 9, 1961

SUPREME COURT OF THE UNITED STATES

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[fol. A]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,072

MANUAL ENTERPRISES, INC., a body corporate, TRIM ENTERPRISES, INC., a body corporate, GRECIAN GUILD, a body corporate, Appellants,

—v.—

ARTHUR E. SUMMERFIELD, Postmaster General of the United States, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Joint Appendix

[fol. 1]

Excerpts From Transcript of Proceedings of April 21, 1959 Before the Post Office Department

P.O.D. No. 1/246

P.O.D. Docket No. 1/235

In the Matter concerning

MANUAL ENTERPRISES, INC. et al.,
and FIZEEK ENTERPRISES

Post Office Building
12th & Pennsylvania Avenue
Washington, D. C.
Room 5241
April 21, 1960
10:00 A.M.

Before: Raymond J. Kelly, Judicial Officer.

APPEARANCES:

Present: James F. Harding, Saul Mindel and Richard S. Farr, Assistant General Counsel, Attorneys For P.O. Dept.

Stanley M. Dietz, Attorney for the Respondent.

• • • • • • •

COLLOQUY BETWEEN JUDICIAL OFFICER AND COUNSEL

Mr. Mindel: Your Honor, I think I should make part of the record at this time before you proceed a certified copy of the court order under which we are moving here today at least so far as the time element is concerned. This is the order signed by Judge Tamm of the U. S. District Court here in Washington on April 14, 1960. In the matter of Manual Enterprise Inc. vs. Summerfield the Postmaster General (presenting same) present that in effect

suspends any further court contention upon a final order of the Post Office department in this matter by April 28th.

[Judicial Officer receiving and studying same.]

• • • • • • •

[fol. 2] Mr. Mindel: What further preliminary matter complainant here and General Counsel has filed his original complaint and two separate amendments. The first amendment was to strike from the caption the name of Fizeek Enterprises because it was not involved actually in the mailability case. The second amendment was to make the additional charge that the mailer is giving information as to where, how and from whom obscene matters may be obtained. I say that was filed I believe last Monday or last Friday. I have not seen an answer to that allegation from the mailer.

Mr. Dietz: Your Honor, this motion to amend complaint which is dated April 15, 1960 was received by me at my office April 19, 1960 at 10 o'clock in the morning. It merely states an amendment that the magazine provides information as to where, how and from whom obscene pictures may be obtained. We of course deny this and it goes into general denial because it is under the same statutes, Section 1461, it goes into the general denial that these magazines are obscene.

Mr. Mindel: It would come within that general area, Your Honor, because obviously those are two separate issues. The statutes prescribes various types of violations, one is the mailing of obscene matter and another rather (sic) is the mailing of information as to where obscene matter may be obtained. They are two separate issues.

However, as I understand counsel he is denying it specifically, its not covering a general, is that correct?

Mr. Dietz: That is correct.

Judicial Officer: The record will show that a motion to amend the complaint was allowed and that the mailer, petitioner denies generally the allegation, therein alleged. The allegation therein set forth.

• • • • • • •

Mr. Mindel: Your Honor, I don't know if the stipulation requires any explanation, I would just like to comment

though if any explanation is needed, that Mr. Dietz and I are agreed that the Fizeek Magazine will be in the trial today for the sole purpose during this stage of the trial [fol. 3] of receiving the testimony of the experts concerning the mailability of Fizeek Magazine, that magazine of course is not involved in the withholding action which is the principal thrust of the action that we are involved in today, and as a stipulation, provides, at some further date to be assigned, we will take up the other issues of fact in law involved in the proposed denial of the publishers application for entry of Fizeek Magazine as second class mail.

• • • • • • •

Mr. Mindel: If I may Your Honor at this time under stipulation with Mr. Dietz, I will put in evidence copies of the magazines which are involved in this joint proceedings here without any further identification. That is in line with the stipulation that Mr. Dietz has just formerly agreed upon with me, if I may I will identify these with the tentative numbers that I've given up for identification.

Judicial Officer: Very well.

Mr. Mindel: Exhibit 1 for identification is a copy of the April edition of Manual, Exhibit 2 May, 1960 issue of Trim —Exhibit 3 May 1960 of Grecian Guild Pictorial—Exhibit 4 copy of March 1960 issue of Trim—Exhibit 5 May 1960 Issue of Fizeek—

Judicial Officer: May what?

Mr. Mindel: I'm sorry, May 1950 Issue of Fizeek and the remaining exhibits at this time are on Fizeek so I won't repeat the name of them, Exhibit 6 July 1959, Exhibit 7 October 1959, Exhibit 8 December 1959, Exhibit 9 February 1960, Exhibit 10, April 1960, Exhibit 11 June 1960 of Fizeek. I offer these all in evidence at this time as joint exhibits.

Mr. Dietz: We have no objection to that.

• • • • • • •

Direct examination.

Mr. Mindel: State your full name for the record please.

A. Frank S. Caprio.

• • • • • • •

By Mr. Mindel:

Q. In your investigation of homosexuals and in your [fol. 4] dealings with homosexual patients hasn't there developed certain specific types of things which create sexual excitement in the homosexual?

A. Yes.

Q. Have they included pictorial representation as well as the printed text?

A. Yes.

Q. So that certain types of pictures am I correct in stating would have an especially stimulating effect upon the homosexual?

A. That is correct.

Q. Before the hearing you had of course an opportunity to examine various issues of these magazines an issue here including Manual and Trim, Fizeek and Grecian Guild Pictorial. You recall that?

A. Yes.

Q. Did you find in these magazines that there were pictures or any other matter, I speak especially of pictures that have this specially stimulating sexual effect upon the male homosexual?

A. Yes I did.

Q. Do you find many such pictures in these magazines?

A. Yes I did, plenty.

Q. I will ask you to deal first as a concrete example with the April 1960 issue of Manual which is given in exhibit Number 1.

(Witness examining this Issue.)

A. Yes.

• • • • • • •

Mr. Mindel: Would that be sexually exciting, sexual arousal type of appeal?

A. Yes, I've been told this by my homosexual patients who have collected magazines of this kind and because of the suggestion of the pubic hair and because of the loin cloth rather than the shorts of the bathing trunks this has a special appeal in the homosexual masturbation fantasies.

Q. Would you say that the use of the posing strap gives a special additional emphasis to the genital region and that is a factor and an attraction which you say the picture has for the homosexual?

A. Yes.

• • • • • • •

Q. Can you state as a general proposition, Doctor, what [fol. 5] elements of the pictures generally that you have seen in these magazines stand out and give that sexually exciting character to the pictures so far as the male homosexuals is concerned?

A. Well, I would say that these two pictures that I identified as Page 2 and Page 3 in contrast say to pictures on Page 8 and presumably Page 9 it is not marked, there is a marked difference between the pictures on these two pages and the pictures on these two pages. That these two pictures have men in the stand out bathing trunks, they have white (sic) lifting apparatus and these wouldn't necessarily be objectionable or necessarily exciting to a homosexual but by contrast these two pictures would be exciting to a male homosexual. These have no evidence of pubic hair, these pictures have evidence of pubic hair and this is exciting to male homosexuals. A picture of this kind without any trunks, "what page is that sir" witness this is page 12 of a male body in the nude would have special appeal to a homosexual, because of the nudity, and homosexuals are not interested in cows and chickens they are interested in the male body and naturally they get the sexual excitement by looking at pictures of nude males. This has also been reported by numerous homosexual patients who I've been treating. These pictures on page 18 and page 19 are also suggestive. They are pictures of nude males with some object in front of the genitals so as to not expose their genitals and this excites male homosexuals.

Q. You mean the fact of a partial but not complete exposure creates excitement.

A. That's true. This picture on page 20 again, the loin cloth, the so-called male G-string as has been referred to in literature, this excites a male homosexual, and this probably would. Oftentimes in order to increase excite-

ment for male homosexuals who buy magazines of this kind they will have a contrasting picture of a picture of a male in sailor's pants, tight fitting pants or bathing trunks and on the page opposite will have a nude form or a G-string and the two tends to make it more excitable to the male homosexual. These pictures on page 22 and page 23 have a special specific excitement and appeal for male homosexuals. You have on the top page a man in this position with a so-called G-string and below you also have a very suggestive pose wearing shoes but it is ridiculous only in that it has a very special appeal for male homosexuals. [fol. 6] Many male homosexuals have reported to psychiatrists that the picture of a nude male wearing shoes gives them added excitement and it comes under the category of fetishism. This definitely has an appeal.

• • • • • • •

This has—perhaps there is even a reason for it being in the center of the book, it accentuates the nude male body with buttocks. I see nothing about body building in this picture at all.

Mr. Mindel: Dr. Caprio, may I interrupt you; why does the exposure of the male body have an appeal to male homosexuals?

A. Because many male homosexuals resort to Ectomorphy Prurient and the buttocks of the male body has a special appeal to them because it stimulates fantasies of previous sexual activities wherein they engage in rectal intercourse. I think making a display of male bodies buttocks appeals to those homosexuals who resort to this type of sexual activity.

Q. What other type of sexual activity will the male homosexual resort to other than the annual (sic) intercourse.

A. Well male homosexuals may resort either to rectal intercourse or a mutual masturbation, mutual fondling of each others sex parts or they will resort to
Those three methods are the routine standard methods that most homosexuals, rectal, ectomorphy passage or H.O. fondling fondling of each others sex parts.

Q. You say you have found various pictures of these various magazines that you say would have an exciting

appeal to male homosexuals regardless of which of those classes of sexual outlet he prefers?

A. Yes.

I think that these pictures on page 30 and 31 are very suggestive poses. This particular one with the legs spread out with the G-string I think have a special appeal to men who are homosexually inclined.

Q. Would you define suggestive poses as you have just used the term?

A. Well this particular pose here with the legs spread out in fantasies homosexuals often resort to malgenital contacts with the passive partner in this particular position.

[fol. 7] Q. Would you call that a sort of an invitation pose?

A. An invitation pose is well put.

• • • • • • •

Witness: This is a very ridiculous picture on page 35 and the only reason that I feel that it is such a bizarre attire of this kind is that it has special appeal to certain homosexuals the so-called V-gown comparable to the V-gown in women the appeal to the homosexuals the so called equivalent to the V-dress in the woman which gives emphasis on the genital organs to focus the attention would have special appeal to homosexuals who are so operated mentally that this would arouse sexual fantasies, and I think that the bizarre picture of this kind would, could only be explained on the basis of appeal to homosexuals. A normal man would find this very ridiculous.

Q. And do you testify that it has such an appeal to homosexuals?

A. Yes it does. I think this picture on page 36 has absolutely nothing to do with weight lifting, has nothing to do with body building and it is the exposure of buttocks again, and I think this would also have the same appeal as I previously testified where the buttocks were exposed and this would have a special appeal for homosexuals. A normal well adjusted man does not need a picture of this kind in order to build up his muscles. I picked pictures on Page 39 for the same reasons as I previously testified,

the G-string with the emphasis on the genitals, and the background of the shrubbery which is not in a gymnasium has no weight-lifting apparatus. And for a nude man with a G-string on him for which I think this would find it more excitable to homosexuals again the fantasy of indulging in homosexual activities out in the forest or whether its shrubbery. This adds to their fantasies.

• • • • • • •

A. For the same reason that I previously stated. And I think on Page—these aren't numbered this probably would be 45, the ads, the advertisement. I think this attracts homosexuals to the top advertisement and to the bottom advertisement and the one on the left, the lower corner is a picture of a nude male with his part of his buttock [fol. 8] exposed and the other one is a suggestive pose of the G-string I think also, the pictures in those advertisements might be considered exciting to homosexuals.

Q. You say the total ad though in each of those has such an attraction to homosexuals especially. Is that your testimony?

A. Yes.

Q. You base it on the picture alone Doctor?

A. I base it on the picture alone and I base it on the context of the magazine in general.

I have come across very little weight-lifting apparatus in this whole thing. There is nothing that builds muscles here, nothing that builds muscles here (turning pages) nothing that builds muscles here and these two pages do have some weight-lifting apparatus, this doesn't, this doesn't, (turning pages) this doesn't I am sure he is not trying to lift that chair for a development of his muscles, this doesn't, this doesn't, this doesn't, this doesn't, this doesn't, and this doesn't, this doesn't (turning pages) and so on and so I would conclude that the theme of this particular publication is to emphasize the nude male body with emphasis on the genitals wearing the G-string rather than any body building or weight-lifting motivation.

So in answer to that question I would make that conclusion on the general context of the entire publication rather than on just the picture alone.

Q. Dr. Caprio, have you had heterosexual patients also?

A. Yes, numerous.

Q. And have you discussed with them also the question of what's sexual excitement?

A. Yes.

Q. From your experience Doctor and your investigations and general scientific background could you come to any conclusion as to the likely audience for this kind of a magazine.

A. Yes. I believe that a magazine of this kind would have a special appeal to male homosexuals and would have a specially male homosexuals who have actually indulged in homosexual practices and who admittedly claimed they are homosexuals, but it also has a appeal to young men, 18 years old, 17 years old who we might classify as borderline sexual cases where they haven't had intercourse with women, they know about homosexuality, they have what [fol. 9] we call light homosexual components within them and because of conflicts they have always tried to fight back homosexual tendencies in themselves and I think that that group, seeing pictures of this kind, that publications of this kind could very well push them into homosexuality only because mentally they find themselves conscious of the male body and I think in that respect often it lifts these young men who are not actually homosexuals but are like this and out of curiosity they look through magazines of this kind and before they know it they start masturbating, and instead of thinking of women when they masturbate they wonder whether their penis is as big as the penis in these male models and they develop all kinds of conflicts and they come to us and say "Dr. Caprio, I don't feel that maybe I should marry" and I say why, and 18 year old boy "well I don't feel that I am developed, I don't feel that I am strong. I came across a muscle building magazine I see some of those men in there and I think they must have real large penises and do you think I'm a queer?" "What makes you think you're a queer?" "Well sometimes I am attracted by these pictures of muscle men I wish I could be like that. I wish I could have their muscles." and they start masturbating with images of the kind of physique that they think they would like to have. I think in this respect it does tremendous harm and I question them I

say "do you buy such magazines?" and my clinical experience has been that they do and I tell them in helping them that their normal sexual adjustment, you have got to stop buying these magazines, you've got to stop looking at these male figures or the so-called muscle men if you eventually want to make a good normal sexual adjustment. You can't masturbate thinking of a man's penis and a man's body and hope to make a normal sexual adjustment.

Mr. Mindel: What would be the likely lasting effect upon this 18 year old assuming he doesn't come to a psychiatrist for treatment.

• • • • • • •

A. Yes, I think that it can very lasting damage so much so—I think that comparable to the damage that fantasies of this kind can push an individual into homosexuality, we feel that a man who exposes himself to a young girl, say 16 years old and unzips his trousers and shows this girl [fol. 10] his erected penis, that such an injury psychologically to that girl might keep her from desiring to marry or might develop frigidity where she is unable to enjoy sexual relations in the event that she should marry. And we know that this is true because we have patients who tell us "Dr. Caprio do you suppose the reason I don't enjoy sex relations with my husband is because when I was 11 years old, 15 years old, some man exposed his penis to me and I became frightened and it left a very bad impression on me" or I may get a man who tells me that he isn't functioning well with his wife and I ask him why and he tells me because he had been seduced homosexually when he was 17 years old when he indulged in homosexual activities voluntarily because of this kind of stimulation. So we know from clinical experience that these damages can be lasting up to such time as they seek treatment and then we have got to undo this damage. We've got to undo this damage by going back into their childhood and taking it year by year by year and offsetting this type of influence.

• • • • • • •

Q. Doctor I will now hand you the May 1960 issue of Trim which is marked for identification, exhibit 2—strike that, it has been received and marked as exhibit 2; I draw

your attention to the picture on page 18 of this magazine which you will see is a picture of a man in the nude except that his trousers are only partly down one leg. Would that particular arrangement or disarrangement of clothing which you see have any special sexual arousal upon the male homosexual?

A. Very much so.

Q. Why is that Doctor?

A. Well, I think that not only psychiatrists feel this way but men in general feel this way that oftentimes a woman who is about to undress her buttocks are exposed and she is in the process of undressing, that this sometimes carries greater excitement than a completely nude individual and on that premise to a homosexual, the suggestion that he is taking his clothes off gives this added excitement for the same reason behind a woman in a strip-tease.

Q. Would that apply to the picture on the opposing page, sir?

A. This would also apply for the same reason, Sir, on page 19.

[fol. 11]

• • • • • • •

Q. I call your attention now to the two pictures of a model identified here as Tom DeCarlo on pages 34 and 35 and ask you to say whether there is any specially significant factor in those pictures so far as the area of your testimony is concerned and ipso facto on the male homosexual.

A. Yes. There are many homosexuals who have peculiar fantasies that differ from fantasies of other homosexuals. And to cite a particular type of sexual deviation within the whole sphere of sexual deviations, some homosexuals have a peculiar susceptibility to pictures of violence where an individual is threatening another male with a sword or an individual is pointing a gun or an individual is whipping someone and he's in the nude with just high leather boots or an individual that is in chains.

I have had homosexual patients who have told me that when they had made an arrangement to indulge in a homosexual experience with a man that they pick up in a public park or in a lavatory they would ask this man to tie them to a chair or to whip them with their belts, they had to in

their fantasy be subjected to the fantasy of being chained and being tied and I think that pictures of this kind would have the special appeal to those homosexuals who have a further complication by getting added sexual excitement by seeing a nude or semi-nude of a man in a G-string of this kind and they masturbate and this gives them added excitement, we know actually from clinical cases reports that pictures of this type give medical excitement.

Q. That would be what I correctively say a Masochistic who would have such a reaction to that picture?

A. Yes and then you have the homosexual sadist which is the other side of the coin where he doesn't want to be tied down but he wants to inflict the act of violence and punishment. And in proof of this is that in many cheap magazines, I think all of this mayhem, cross advertisements of whipping scenes and this appeals to homosexuals who have the act of sadistic instinct to inflict punishment on other individuals.

Q. Well among the homosexuals is there such a thing [fol. 12] as an active partner and the other is a submissive partner, a passive partner?

A. Yes. And then there are individuals who reciprocate who are mutually responsible.

Q. You have discussed briefly the problem of fetishism, I call your attention to an advertisement on page 46 of this advertisement, an advertisement of one who calls himself, D. Pagaf which has—

Judicial Officer: That is exhibit 2?

Mr. Mindel: Yes, Sir, same magazine exhibit 2 and I call your attention to that picture and ask you if that would be a valid example of illustrations of fetishism.

A. Yes.

Q. Say why?

A. I have had many homosexuals and I have observed other psychiatrists working in this special field wherein they have similar experiences wherein a homosexual will relate that he gets added excitement wearing say a leather jacket or a simulated leather jacket or be partially dressed with some garment and then down from the waist be naked or with his shoes on and we classify this particular type

of sexual deviation as fetishism and I think that this is quite clearly obvious that no individual, normal man who wants to develop his body is going to learn anything about body building by seeing a man with his rear end exposed and wear a jacket that is absolutely ridiculous.

Q. Would such exposure as you find in that picture have a special and or erotic appeal to a homosexual?

A. Yes, it would stimulate tendencies of a rectal intercourse unless they are trying to see the jacket—maybe they are advertising the jacket.

Q. Apparently not Doctor as it said send three dollars for a sample set of prints.

The next exhibit we have here is Grecian Guild Pictorial for May 1960; Doctor I would like for you to look through here and just say whether you have whether you would apply the comments that you have made heretofore which were of a general nature to these pictures that you find in this magazine?

• • • • • • •

Witness: Yes, I would say as to this particular publica-[fol. 13] tion, even focuses greater attention on abnormal sexual fantasies and have a special appeal to homosexuals. This particular pose exposure of the buttocks—why this man has a helmet and only has a G-string is something I can't appreciate in connection with the art of body building, and so we have to conclude that it is a matter of fetishism that he has this special excitement.

Again I don't see the necessity or the function of the sword that the man in the G-string in connection with body building.

Q. Well what significance would you attach to it insofar as an appeal to a male homosexual is concerned?

A. Well psychoanalysts who have done much research in homosexuality, they base the reason for many of these fantasies which homosexuals develop, masochistic fantasies, sadistic fantasies in that the feeling of being penetrated as the sword symbolizes the person who uses the sword, not to hit a person over the head, you use the sword to stab someone to penetrate. It is a penetrating weapon and in rectal intercourse actually the penis serves in this

capacity. It is a penetration of the anus. So in their fantasy they get sexual excitement feeling that they are overpowered they are penetrated from behind and many of them have terrible nightmares feeling that somebody is trying to stab them with a knife from behind, and psychoanalysts have actually proven that this is not wild speculation but it is based on actual clinical evidence that these patients are afraid of being homosexually seduced by means of the rectum and they have such dreams of having the sword come from the behind. And I think that pictures of this kind are explained on that basis and I think that is the reason that you find such pictures of chains and swords, that these individuals have read up on books of sexual pathology and they know what appeals and this is the reason that you find it. This again is the picture of the chains which clearly dashes a man in agony, here is a very anxious expression on his face struggling against chains, which is what I pointed out earlier that a certain type of homosexual will get added sexual excitement looking at this picture otherwise how would you explain why a picture of this kind would be in such a publication if there didn't have to be some connection with homosexual sex life.

[fol. 14] Q. Well you do find Doctor from your own experience and study that that is the likely effect of such a picture upon the homosexual, the effect you have just described?

A. Yes. This is another picture again that would appeal to homosexuals.

• • • • • • •

A. This is page 14 of the nude male with a glass in bed, a nude male in bed holding a glass. Again we have the same theme or idea of the helmet and the gladiator and the sword symbolizing power.

Q. Have you noticed in examining these magazines a common recurrence of the sword as a factor in the pictures.

A. Yes here and there you'll find this sword. Here is another one with the sword being paired with the gladiator.

Many homosexuals are very weak. They suffer from a terrific sense of inferiority, sexual inferiority. In fact this is one of the causes of homosexuality. They are afraid

that they cannot satisfy a woman. They cannot function properly and the fear of losing their erection with a woman makes them turn to their own sex and compensating for their inferiority they have to have fantasies with men of power, men with a whip, men with a sword, gladiators and they identify themselves with these nude pictures and this gives them sexual excitement. And the harm does (sic) is that they remain at this level. They remain as homosexuals, they don't have a chinaman's chance of becoming cured as long as they are constantly stimulated by this type of picture.

Q. You notice the title of the magazine you have in your hand Doctor, Grecian Guild Pictorial and I call your attention to the legend on the top of Page 2. Would you comment as to whether you find any special significance there to the male homosexual and would you first read it, I neglected to ask you it. I'm sorry.

A. Yes, it is a picture of a so-called frieze on presumably one of the grecian buildings and the quote underneath is we are all Greeks. Our laws, our literature, our religion, our arts had their roots in Greece and Shelley, I presume Shelley the poet.

Q. Yes and my question was whether you see any special significance in any part of that with regard to male homosexuals.

A. Yes.

[fol. 15] Many homosexuals refer to homosexuals as Greeks or a Turk. It is no reflection on the country of Greece or the people who are well adjusted living in Greece, but unfortunately historically there is some evidence that homosexuality had been practiced among Greeks and Socrates the Greek Philosopher was supposed to have seduced young boys for which he was given the death sentence by drinking the poison hemlock and this came on as a legend if it is not factual that the Greeks indulged in homosexuality, and this also applied to female homosexuality in that Sappho was a Greek poetess who also seduced many young girls to lesbian love and this also is Grecian in art so the connection of this quote the Greeks and the general nature of the picture says this correlation between the Greek love or homosexual love.

Q. The term love as you have just used it and explained it would that be limited to one manifestation and one type of activity for the male homosexual rather than another?

A. Well different homosexuals have different versions. Some claim that a Turk is an individual who takes the active role in rectal intercourse and some refer to Greek love as masochistic contacts, but I would say that predominant feeling among most homosexuals is that Greek love refers to rectal intercourse.

Q. I hand you now exhibit 4 and invite your attention to a picture—these pages aren't numbered Your Honor that is why I am hesitating.

Mr. Dietz: We are on exhibit 4 now?

Mr. Mindel: Right.

This would be on page 11, and I ask if you find any special significant factors in that picture with regard to the male homosexual?

A. No as such, in all fairness to this whole discussion, I don't see anything particularly objectionable to these two pictures.

Q. Would you turn to page 30 of this same exhibit and my question would be the same.

A. Yes. This particular picture on Page 30, I think that the position of this man even though he does have trunks on is such that it creates an emphasis on the genitals as though his penis was in a state of semi-erection and this is very excitable to homosexuals. Homosexuals, if in their fantasy they see any kind of a picture where they think [fol. 16] that the penis is in semi-erect or erect state can add an excitement. I think that this is quite obvious to anyone that the genitals are emphasized here.

Q. Have you found such emphasis in the other pictures that you have examined in this or in any of the other magazines which is an issue in this case.

A. I wouldn't find anything objectionable by contrast in this other picture here below but I would on this picture and not on this.

Q. Doctor this emphasis which you have just described regarding the picture on page 30 because of the state of erection or semi-erection which you say you find in that

picture, have you found a similar emphasis because of such apparent state of erection or some erection in other pictures that you have examined in this magazine or the other magazines at issue here.

A. Yes, Yes. I think for example these two pictures there are some.

Mr. Dietz: What page is that please?

Witness: Presumably this is 32 they are not marked, but by previous pages this should be 32 and 33 and I think again here the Bikini makes it quite obvious that the genitals are emphasized.

Q. Do you find any of the latter pages of that magazine, Doctor?

A. Yes I think this is quite obvious on page 39 in the lower right corner I think there is some emphasis on genitals accentuation of a semi-erect penis and again as I previously stated, having pictures on one page with tight sailors trunk pants or any other tight fitting pants and on the opposite page of this type I think this is added sexual excitement to a homosexual.

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[fol. 20] Q. And do I understand correctly your testimony, Doctor that you would say to each and all of these magazines in these issues of the magazines that are presently in evidence which you have reviewed before the hearing and just now in the morning session of the hearing, do you find that their dominant effect is one of sexually arousing appeal to the male homosexual and that to the male homosexual is the audience that this kind of a magazine will attract according to your experience and your training in this study and all the rest of your scientific background?

A. Yes, I do.

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[fol. 27] Q. Doctor Caprio, a few minutes ago you were testifying of the advertising items we had in the magazines and you also made a general statement concerning the advertising we find in all of the magazines we have before us here. You will note I now hand you exhibit 1 again the April Issue of Manual on Page 44, Manual

Directory and it says Manual Directory—listed below are the artists and photographers with whose work Manual is familiar and urges its readers to support. Send one dollar for catalog and tell them you saw their work in Manual, then it has a list of all of these names—trade names I think most of them are—and their addresses.

(Witness examining)

That sort of directory, I think appears in all—almost all of these magazines. Would you say, what would you say Doctor as to the likely appeal of the advertising in these magazines, the Directory and the separate display ads with respect to this homosexual readership that we have discussed here?

A. Again I quite strongly feel that it is mainly directed towards exciting homosexual groups in this country.

Q. And would you say as you did on a specific item before that it would excite sexually aroused interest and want them to purchase the pictures that were advertised?

A. Yes that's right. I base that on actual evidence that I have gotten from homosexual patients who I have gotten over many years who have told me, I have one patient he is married now—for treatment and prior to marriage by gosh he brought me a suitcase of this sort of material of men in G-strings, and some of them came from foreign countries, the poor fellow was addicted to masturbating looking at these pictures and he was all fouled up, had a severe anxiety neuroses and didn't quite know whether this made him a homosexual but he was addicted to this sort of mailing by sending through the mail money and getting pictures of this kind.

[fol. 28] Q. And you think this would be a typical reaction of the male homosexual in reading this magazine or these magazines?

A. That's right.

Q. Just now you referred to causing the reader that you had reference to, to masturbate. Did you intend to limit the sexual outlet of the sexually aroused homo aroused by the pictures in these magazines to that kind of sexual activity.

A. I have had patients who had sent for pictures so many

pictures of nude males and upon receiving them it stimulated them into seeking opportunities for indulging in homosexuality where actually the pictures the nude pictures of the nude males triggered off this lightened homosexual component into expressing it and threw them into homosexuality out of the pictures alone.

Q. And what would you say as to the effect upon the so-called practicing established homosexual rather than one whose homosexuality was latent up to that point?

A. Well, unfortunately, it does damage in that it keeps him constantly homosexually minded by constantly fixated on his own sex. He doesn't have a chance to even develop ideas of being cured going to a psychiatrist for treatment and he becomes addicted just (as) you would become addicted to morphine or drugs. These poor fellows can't help themselves and they take their money and they send away for these pictures and they masturbate and they go out and drink beer in some tavern and pick up some fellow and have a homosexual experience and then on money they send their three dollars or six dollars for more pictures then they masturbate and then they go to the beer tavern and pick up another fellow or in the park—they send out six dollars for six more different pictures of different men and this goes on and on. This has been told to us so what conclusion can we come to as a psychiatrist between the relationship of cause and effect. And they actually bring pictures to our office and show [illegible] say here I sent for these pictures from this company.

Mr. Mindel: That is all on direct, Your Honor.

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Cross examination.

By Mr. Dietz:

[fol. 29] Dr. Caprio, you have adverted to certain things, characteristics contained in the photographs of these magazines which you say appeal to homosexual, to sexually arouse a homosexual.

I ask you Sir is this not a fact that just a plain photograph of a man with a hairy chest could appeal to some homosexuals and sexually arouse them?

A. Not necessarily.

Q. But it could, couldn't it, Sir?

A. Anything, we could have a war.

Q. And anything at all, anything in this room. Anything the Judge is doing could appeal to a sexual deviate to arouse him now is that not true, Sir?

A. I don't think that this is a valid premise because when you say could, you are putting me in a position where anything is possible. I could have a heart attack in the next half hour. If I would say no to this, this would be stupid of me I have to say yes that anything is possible. If you ask me if anything is possible in such a broad term, that a homosexual might be aroused by a statue of a man on a horse in a public park.

Q. All right now, Sir, is my smoking a cigar not something that generally could arouse a homosexual?

A. No.

Q. It's not?

A. No, because it gets into the ridiculous. And you have got to draw a line some place as to what is logical and what possibly could happen and what is a ridiculous assumption and an unusual exception.

Q. All right now, do you limit then the things that arouse a homosexual as a picture of a man wearing shoes when he has little or no other clothes on? A photograph of a man in tight pants? A rear view photograph of a nude or possibly also the photograph of someone wearing a V-shaped piece of clothing? Are those the things that are the only things that are sexual impulses in homosexuals?

A. I didn't say that.

Q. Well I ask you, Sir, if you do say that answer.

A. No, I don't say that.

Q. Well, then, will you please list for me, Sir, what things in your opinion arouse sexual desires in a homosexual?

A. It would take all afternoon.

Q. That is just the point it would take all afternoon. There are so many things that it would take all afternoon?

A. Some are probable and some are improbable in degrees of excitement.

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[fol. 30] Mr. Mindel: All right under non-sexual sources of erotic response among pre-adolescent and younger adolescent boys Mr. Kinsey has this list under chiefly physical "Sitting in class, friction with clothing, taking a shower, punishment, accidents, electric shock, fast elevator rides, carnival rides, ferris wheel, fast sled riding, fast bicycle riding, fast car driving, skiing, airplane rides, a sudden change in environment, sitting in church, motion of car or bus, a skidding car, sitting in warm sand, urinating, boxing and wrestling, high dives, riding horse back and swimming."

Now that is the list of chiefly physical sources of erotic responses listed by Mr. Kinsey or Dr. Kinsey.

Q. Do you agree with that, these things that I have listed?

A. I don't disagree. And I think I can save you a lot of time. I met Dr. Kinsey, I was invited by him to visit him at Indiana University, I am acquainted with his ideas and I think that what you have just recited absolutely has no bearing on the point that I have tried to make. That while Dr. Kinsey was correct that anything was possible of exciting either a woman or a man sexually—we have patients who are excited by religious figures which is a very bizarre source of stimulation and you can add to this thing people who have even been sexually stimulated in church but this wouldn't prove that a flagrant exposure of nude males in the United States to men with emphasis on the genitals that because a person might be sexually stimulated by seeing two dogs having intercourse which can't be helped, how are you going to talk to the dogs, say look, don't have intercourse so that you don't make any suggestion to young boys. This is ridiculous so of course there are going to be two dogs that are going to have intercourse so some 17 year old boy might get sexually aroused. There are a lot of things that can't be helped as a source of sexual stimulation, this is part of life. A person passing a burlesque show advertising semi-nude women if young boys passes by an advertisement of a night club act, goes home and masturbates what does this prove? Are you going to tell all the night clubs all over

the United States to put a cloth in front of these advertisements? This can't be helped. You got to be reasonable. There are sources of sexual stimulation that cannot be eliminated and there are many of such sources of sexual stimulation. But there is such a thing as sex exploitation [fol. 31] where you deliberately by mail send pictures of nude men or semi-nude men with emphasis on the genital organs that does terrific damage on the development of young adolescents and this I don't think Dr. Kinsey would have any quarrel with. So what have you proven that a person can be sexually stimulated watching two dogs, a cow and a bull?

• • • • • • •

Q. In these magazines which you have looked at today, the exhibits in evidence have you seen one or any photograph of male penis?

A. No.

Q. Do you consider a photograph of a male penis to be sexually stimulating to the homosexual.

A. Yes it would.

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Mr. Dietz: May I continue.

Judicial Officer: Yes, Sir.

By Mr. Dietz:

Q. Are you familiar with this book Helios?

A. I am not with that particular Issue.

Q. But you are familiar with that nudist magazine?

A. Yes.

Q. Do you receive that magazine?

A. No.

Q. Have you ever bought one?

A. No.

Q. I show you this Sunshine and Health magazine and ask you to glance through it and look at the photographs—oh first may I strike that and ask you this question: Is the same criteria for a lesbian as there is for a homosexual that there are certain things that appeal to the sexual de-

sires of a lesbian that are different than certain things that might appeal to the normal person?

A. Yes.

Q. All right. Now will you look at that magazine please.

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Mr. Dietz: Have you looked through that magazine?

A. Yes.

Q. Have you seen anything in that magazine that would appeal to the prurient or to the sexual desires or arouse sexual thoughts either a homosexual or a lesbian?

A. Yes, it would.

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[fol. 32] Witness: I think a magazine of this kind definitely would appeal to the prurient interest of some people. I think it would be very inaccurate of me to say that it wouldn't appeal to the prurient interest and if I may comment, my experience with magazines of nudist colonies, they have actually proved my point of hiring professional models that were beautiful to pose in the nude. They never held a membership to a nudist colony and they were definitely hired for the purpose of appealing to the sexual interest of people who bought the magazine.

• • • • • • •

Q. All right. Now I show you this nudist calendar and ask you to look through that and see if there is anything in that that could appeal or would appeal to lust or sexual arousement of a lesbian or a homosexual?

A. Yes, I would have to be truthful.

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Mr. Dietz: I ask you Doctor, to look at this photograph of March 14, 1960 Issue of Time Magazine—this advertisement. (Witness so doing.)

Q. Did you look at it?

A. Yes.

Q. In your opinion would that photograph appeal to arousing lustful thoughts in a homosexual?

A. Not necessarily.

Q. Could it?

A. It could, Yes, taking in exceptions.

Q. And there are so many deviations among homosexuals that actually no one could really come in and testify as to all the different things that could appeal to arousing sexual thoughts, lustful thoughts of the homosexual. Now is that correct?

A. I think we could pin it down to the major things that usually appeal to homosexuals.

Q. All right major and minor, no one man would be able to testify to all the things would he?

A. Well he would have to make a study of 2 billion people.

Q. Have you ever made any study of weight lifting?

A. No, I haven't.

Q. You have never done that yourself, weight lifting or anything like that body building?

A. I haven't specifically—No.

Q. You actually don't know that, Sir, what interests a [fol. 33] body builder or a weight lifter as far as his concern for development of his own body, do you, Sir?

A. Only from patients of mine who have—

Q. All your patients have been sick people are they not, Sir? 'Isn't that why you treat them?

A. Who is sick? It's a matter of degree.

Q. Do you consider yourself sick?

A. I would consider myself partially neurotic to be truthful because I have written in my books that all human beings have their frailties. If by normality you mean perfection, I am not a normal person if you regard me as a perfect person, I am not perfect person and I have my faults and frailties and you have so we are all partially neurotic and it is a matter of degree of neuroses and degree of abnormality. And what is normal in one part of the world isn't normal in another part of the world so normality is a very relative term.

Q. All right now, Dr. Caprio, you are familiar with Dr. George Henry, you testified to that before.

A. Yes, I am.

Q. Just so that the record is straight, and to show that there are other theories besides what you have stated here regarding what causes homosexualism, and I ask you, Sir,

whether Dr. George Henry does not propose a theory that homosexuality is strictly a glandular matter that reading books or looking at pictures would have nothing to do with a person becoming a homosexual and actually Dr. George Henry conducted extensive tests—

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Mr. Dietz: I am asking if he is familiar with the work of George Henry two volume book sexual deviation.

Q. Are you familiar with them?

A. Yes, I'm not only familiar with them I had the opportunity of knowing him personally.

Q. Besides so from your testimony before and to this statement that you have made, a scientifically erroneously statement I don't think that Dr. George Henry would stand for being misquoted. He does not subscribe to this theory. He does not.

A. No, this is in my own field of work. It is no law it is psychiatry and I know what George Henry believes.

Q. Did George Henry conduct extensive examinations, [fol. 34] urine analysis, conducting urine analysis of patients to see if male and female hormones in the urine and did he not conduct extensive blood tests.

A. There are many besides Dr. George Henry, Dr. Carl Bowman for one in San Francisco have conducted to by trying to decipher whether or not there is any organic basis for homosexuality by glandular, the greatest authorities of the United States as of today including Dr. Bowman and including Dr. Henry who has made this very research experiment that you have referred to have come to the conclusion that homosexuality by and large is an acquired sexual elaboration and that in some instances they have found a certain glandular or defect today it is still in the experimental stage where they are still conducting experiments in California and in other parts of the United States in order to find the connection between the glandular defect and the homosexuality but this isn't an established fact by any means.

Q. All right so that, Sir, you would have to say that since they are still conducting experiments, it is still a

matter of tremendous controversy in the medical profession is that not so, Sir?

A. I would say it is controversy but not tremendous controversy.

Q. All right, well how about Dr. Sheldon from Harvard, the University, are you familiar with that gentleman or his works?

A. Yes.

Q. Now I ask you, Sir, is it not a fact that Dr. Sheldon's theory is strictly Ectomorph and Endomorph as the causing of homosexuality?

A. That is his theory.

Q. And that is entirely contrary to what you have stated in here today is that correct?

A. That is just his theory.

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Q. Sir, based upon what you have just said, would you say that everyone that purchases this type of magazine is a homosexual. (holding up Manual)

A. No, when you ask me a question of this kind whether everyone who purchases a magazine of this kind is abnormal, I would say no to that. I would have to be truthful because—

Q. Because you are under oath if nothing else.

A. Because normal people are curious and a normal person might pick up a magazine of this kind and bring it home [fol. 35] and browse through it, but he may not keep buying it. Or he may be an artist, maybe he does want to draw a nude male and he sees this magazine and maybe he says this magazine has the very thing that I am looking for—but this is an exception, this isn't the rule.

• • • • • • •

Q. Yes and also look at this magazine 1—the homosexual viewpoint. (Witness looking.)

Mr. Dietz: I might state, Your Honor, this magazine 1 is the magazine the basis of the decision of the Supreme Court of the United States, one Ink vs. Oleson, on the mailability.

By Mr. Dietz:

Q. Have you had opportunity to look at them?

A. Yes.

Q. All right now what you have seen in those magazines, Sir, in your opinion the contents there would appeal to the homosexual?

A. Yes. I would say that this particular picture would appeal to the prurient interest of the homosexual.

Q. How about the pictures on the next page, keeping in mind will you please, Doctor, that these magazines by their own context have admittedly are being beamed at homosexuals. Do you think the other pictures would appeal to the prurient interest of the homosexual?

A. This might appeal to the prurient interest. This may not.

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[fol. 36] Mr. Dietz: All right, Dr. Caprio, take these pictures starting with the cover on this exhibit number 7. Does the front cover depict to you a well developed or an underdeveloped man. This is another matter, I think. If you were asking me to evaluate pictures in terms of muscular development I take this as an entirely different issue.

Q. Well, all right, I will ask you, Sir, if you will look through this book and tell me if you can, Sir, any photograph of any man that you would, as a Doctor of medicine consider under-developed.

Judicial Officer: I don't think that that is an issue here at all.

A. I am not an expert on physical development.

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Q. Have you seen any other physique magazine that is sold in the United States?

A. I may have.

Q. You may have.

A. Yes.

Q. Well, I ask you, Sir, to just briefly glance through this collection of Physique Male magazines (Witness looking through some magazines).

[fol. 37]

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Q. Doctor, you have very quickly looked through these examples of the Physique magazines I have shown you. Did you see in these magazines opposing straps comparable to the type we have.

A. Yes, I have.

Q. Did you see in these magazines a rear view nude photographs the same as we have?

A. Yes, I have.

Q. And you have seen just about every type of picture that we have had that you have testified to today in our magazines or these magazines. Now is that correct?

A. That's correct.

Q. Now Doctor, you testified before regarding this exhibit number 1, page 35—this is the V-shaped picture, Your Honor, regarding this picture that that would appeal to lustful thoughts in a homosexual. Now I show you from Revels number 5, $1.00 which was purchased today in the District of Columbia and ask you if that was the V-shape that you were referring to, the V-shaped garment that you were referring to?

A. Yes I think the analogy is correct.

Q. All right and this is the same type of photograph in this magazine as you have referred to in our magazine.

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Q. I show you now exhibit number 2 which is in evidence these two photographs which you referred to before on pages 18 and 19 and first of all may I ask you a question, Doctor, on the photograph on page 18. Is that man putting on his pants or taking off his pants?

A. Well at best I can only give a scientific guess.

Q. All right scientific guess.

A. Scientific guess would be that he is taking them off.

Q. And I believe you testified that that picture of a man undressing taking off his clothes, even though it is based upon a guess, would be appealing to the sexual desires of a homosexual?

A. Yes.

Q. All right, I show you this photograph of Sprite, Vol. 1, a book we purchased here this morning here in the District

of Columbia, a photograph, a full page photograph. Now, does that depict a young woman undressing?

A. It does.

[fol. 38] Q. And would that picture appeal to the prurient interests and desires of a lesbian?

A. Not particularly a lesbian, a man.

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Q. Doctor did you seen any photographs in any of our magazines of a man whipping a woman or another man?

A. No.

Q. I have a couple of other questions. Did you see any photographs in any of our magazines of a man or a woman fooling around sexually with an animal?

A. No.

Q. All right. Now Doctor do you know what would stimulate a lesbian?

A. I believe I know a few things that stimulate lesbians.

Q. All right, are there just as many things to stimulate a lesbian as it could stimulate a homosexual?

A. I have never made an accurate statistical study between a homosexual group, male homosexual group and a lesbian to give you an accurate answer to whether or not there is just as many things that would stimulate a male homosexual as would stimulate a lesbian.

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Mr. Dietz: Your Honor this man has testified as to the effect upon particularly susceptible groups, homosexuals. I think that is a fair interpretation of his testimony and surely if your honor cannot correlate lesbians as being a particularly susceptible group the same as homosexuals.

Judicial Officer: I don't think we have the question here before us at all on the question of lesbians or even of man and animals. That is a—

Mr. Dietz: This is what the Doctor brought up, Your Honor.

Judicial Officer: I can separate the wheat from the chaff, I think.

Mr. Dietz: I'm sure you can.

Judicial Officer: I think we are losing sight of the squirrel, let's keep hunting the squirrel in this case and not go

all over, we can't solve every riddle of human depravity here today, I don't think.

(Mr. Dietz resuming cross-examination.)

Q. Now, Doctor, your testimony was that photographs of nude men out in the woods so to speak would be sexually stimulating or arousing to a homosexual, is that correct?

A. That is correct.

[fol. 39] Q. I show you now the next page on Sprite, a photograph and ask you if that is not also the same type of photograph here, a nude female out in the woods, misty flowers—

Mr. Mindel: The doctor was not testifying on direct concerning pictures of nude females.

Judicial Officer: I don't think that we can say that he was on direct.

Mr. Dietz: Your Honor realize that I differ in my opinion.

Judicial Officer: You have a right to.

Mr. Dietz: Based upon Your Honor's ruling and conformance thereof I think it is fair that I make a profert this time to show your honor that I would have interrogated the Doctor regarding nude female photographs in the Book—Blondes Brunettes and Redheads, Vols. 1 and 2 which was purchased today here in the District of Columbia, nude photographs in Playboy Magazine which was purchased today here in the District of Columbia at a cost of 50 cents to my client and in Modern Man the adult picture magazine May 1960 issue which was purchased here in the District of Columbia. The point being, Your Honor, if the Doctor was to testify as to the effect upon any particular susceptible groups that we may be allowed to show the correlated group on one hand you have homosexuals on the other hand you have lesbians.

* * * * * * *

Mr. Dietz: My point and on the record is that this stuff is available here in the District of Columbia as part of the contemporary community standards of what is sold and purchased here in the District of Columbia and available to lesbians, normal women, available to men, to homo-

sexuals, just the same way our magazines are on the newsstands here in the District of Columbia and available for sale and purchased by any of those aforementioned groups.

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(Dietz resuming questioning.)

Q. On exhibit number 2, on page 34 and 35 you testified before because of the chains that these photographs would appeal to the sexual desires of this particularly susceptible [fol. 40] group of homosexuals and in exhibit number 3 you testified as to pages 8 and 9, a view of a man on page 8 of a man in chains and page 9 with a sword. I ask you Doctor if you are familiar with the Greek Fable of Prometheus?

A. No, I am not too astute on Greek mythology.

Q. Well, Doctor, if I told you that the Greek Prometheus was the God who thought he deceived the King of the Gods and was chained, entirely chained by Zeus and then broke his chains, that's part of the Greek fable his breaking away from the bondage, the chain gave us our light and our day and is so depicted in these magazines. Do you still agree that any photograph of a person in chains of a male as depicted in these magazines would appeal to the prurient interest of this particularly susceptible group, the homosexual.

A. Even more so. I think it is a clever gimmick to exploit Greek Mythology in an effort to appeal to homosexuals by making use of something, a hook to hang their hat on, digging up something in Greek Mythology that might appeal to the Masochistic and sadistic components of the homosexual.

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Redirect examination.

By Mr. Mindel:

Q. Dr Caprio, a question was asked of you earlier in cross-examination as to whether or not any of the pictures —in Mr. Womacks' magazine the publisher of various magazines, whether you saw the penis in any of these

pictures and you answered no. Would you answer the same if the question were did you see any of the penis clearly outlined in the posing strap or any other garment appearing on the model?

A. In this batch here?

Q. In the magazines that are in issue here, Trim and Manual and Fizeek?

A. Yes.

Q. Your answer is Yes you have seen the penis so outlined in the various pictures of these magazines?

A. Yes.

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[fol. 41] Direct examination.

By Mr. Farr:

Q. State your name?

A. Joseph B. McGovern.

Q. What is your address?

A. 3734 McKinley St. N.W., Washington, D. C.

Q. I understand you hold a PHD from Catholic University?

A. Yes.

Q. What subject?

A. Clinical psychology.

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Mr. Farr: Now you have previously testified, Doctor, that you have had occasion to read and study these magazines, is that correct?

A. Yes.

Q. In your opinion for whom would these magazines be designed or to whom would they be directed?

A. They are directed primarily towards a special group and this group may be characterized by the fact that the majority perhaps more than 90 percent or 95 percent are male, and the majority are likely to have problems as regards their masculine adequacy and perform of overt sexuality or in terms of latent problems of sexual development fixations at earlier levels of sexual development which

are enhanced by the individual in terms of feelings of inadequacy, inferiority and wish fulfillment for status prestige and power.

Mr. Farr: Speak up just a little louder please.

Q. In your opinion, do these magazines have a dominant appeal for homosexual males?

A. Yes.

Q. These magazines have a particular appeal to the prurient interest in sexual matters for the homosexual?

A. Yes they do.

Q. Would you say that this prurient appeal dominates over other values of the magazine?

A. Yes. The prurient is the only isolatable value of the attraction for sexual lust for reactions.

Q. Would you say from your studies that the magazine had any literary value?

A. They do not.

Q. Do they have any scientific value?

A. They do not.

Q. Do they have any educational value to your knowledge?

A. They do not.

Q. Do you believe that this appeal to the pruriency goes substantially beyond customary limits of candor and expression?

A. Yes.

[fol. 42] Q. What effect if any do these magazines have upon the behavior of homosexual males in your opinion?

A. It is likely to stimulate the individual sexually and he of course will react in terms of overt behavior in accordance to his individual personality and his pathology.

Q. What specific act do you believe these magazines could evoke in homosexual males?

A. Every possible sexual disorder.

Q. Such as, Doctor.

A. Approaching another male either normal or abnormal for purposes of sexual relationships self-abuse in terms of masturbation, exhibitionism, various forms of the individual behavior, what I am saying here is that this material stimulates the instincts because such persons have inade-

quate control of their instinctual drives they are likely to react according to their defenses their ordinary way of reacting. Now sexual deviancy is a wide range of behavior.

Q. Could that take a behavior of anal genital behavior?

A. Yes every possible conceivable form.

Q. What effect if any would these magazines have upon the behavior of adolescent males specifically?

A. Well, there again the same model applies and they would react primarily with instinctual arousal, sexual arousal which would take the form of fantasies, immoral and sexual thoughts and also in the form of masturbory behavior or an increased reliance upon this type of addicted material to stimulate them better for their needs and would also lead them into contacts with other persons too so that this behavior could be good behavior or could be individual behavior but in all aspects it would be characterized as sexual behavior.

Q. Would it lead these adolescents into homosexual patterns?

A. Yes, definitely.

Q. Now, I understand, Doctor, that you have had occasion to prepare these magazines with various other cities for obscenity or pornography or as defined by other psychologists is that correct?

A. Yes.

Q. Would you please explain how these magazines compare or rate on the index that you had prepared from rating the works of others that made studies of this field?

Mr. Dietz: This is based on hearsay I assume, Your Honor, I therefore object to it.

[fol. 43] Mr. Farr: Mr. Judicial Officer, I am asking the witness at this time to rate these magazines on an index that he has prepared based upon his study of other authors and at this point to lay a foundation perhaps I had best ask him who the people or who the authors are of the original anthesis of pornography and techniques of obscenity that he would be adapting and developing his own index.

Judicial Officer: I will take the answer, let's go ahead.

A. Well, of course, this is a controversial area the difference between the art and other forms of expression and what is considered to be obscene and there are basic rules which the observer or the investigator can use in a term of what is hard core pornography or what is for example erotic realism in art and primarily the idea is that if it appeals basically or almost entirely or primarily to the prurient interest the erotic fantasies, sexual arousal of the individual and to no other major topics that is likely to be obscene.

Of course this can be broken down into various areas the intent of the publisher and the material and the content of the material itself and the organizational structure of the material and the gimmicks or techniques which are used to get across this basic pattern, to stimuli and of course the effects it has upon the individual too. And in the literature in which I have conducted research and there are at least 12 criteria which are very specific and explicit which distinguishes pornographic or obscene material from other controversial material. First of all is the intent of the material as a whole: what is the dominant theme in the material taken as a whole not just one particular part but the entire message of this appeal, does this appeal to prurient interests of the reader, the person who buys this magazine or this publication, in other words, is it gentle or is it morbid or does it appeal to the sexual arousal or to some extratory functions and is this content alone, is this primarily directed toward this activity rather than to an educational or literary entertainment or to scientific interest.

Q. Now in regard to that criteria, Doctor, how do you read these particular publications?

A. In terms of my entrances from all the data con- [fol. 44] sidered as a whole I would conclude that the intent of the publishers is to arouse prurient interest in the individual. Now this is of course the salable aspects of it. I imagine that to the primary motivation is financial, but this is the vehicle or the method used for financial gain.

Q. And the next criteria, Doctor?

A. The organizational structure of the data: now material is pornographic if the individual is constantly stim-

ulated by a series of repetitious stimuli either literary or pictorial and there is a definite focus upon the sexual aspects rather than upon any other aspects of the publication. And in this collection of evidence, there is the stereotype repetitious display, every page has a picture on it, the cover has a picture, the rear cover has a picture and even advertisements have pictures so there is a stereotype repetitious display of nudity and of the physical person. And in addition too, you find that there is this repetitious series of stimuli, there is what they call the build-up technique, it starts off slowly and by the time it gets to the middle of the book, there is a climax or it reaches its highest peak and then it settles down toward the end so that each one of these books, in each one of these books you will see there is a double page spread right in the middle so that it is a climatic or orgasimic approach to the presentation of the data. This is a basic technique of pornography. The development from the cover appeal to the central theme or the issue in the book. And every one of these publications has the same kind of format and of course the audacious or the most tabooed picture is usually the one that is the climax of the presentation for the information, so this in itself is another index of pornography. Not one index alone establishes pornography but when you take them all together you have reasonable basis for assuming the material is obscene.

Now another technique is what they call authoritative condonement where they have a quotation from authority to say that this particular material is all right for the reader. For example they have in one of these magazines the Grecian Guild Pictorial for March on pages 14, 15, and 16 they have a father-son combination where the father is initiating the son in a very permissive way to the ritual of the body culture. In another magazine of the same type [fol. 45] Grecian Guild Pictorial for March 1960 they have implied endorsement by a clergyman in England who prays for the attention of this group and who has made a statement about the body being the sanctuary of the soul. And in another addition here they have a clinical psychologist who will answer any subscriber's letters and give them personal guidance and of course this is unethical

as far as the American Psychological Association is concerned but here you have a scientist, you have a father figure and you have a religious person who implicitly condones and permits the reader to satisfy himself in this material. In other words you have a built-in guilt relieving mechanism so that the observer can go along without developing too much anxiety. And of course this is obviously a technique which is used.

Another aspect is the confusion the putting together the diffusion, the putting together of the aggressive hostile personality with the sexual aspects, for example all throughout here you have symbols of guns of swords, of man who is reaching out and symbolizing with his finger you have poles and you have all kinds of valid symbols of power and potency and you have destructive gestures with the swords and various weapons, and this is a combination a pathological combination of hostility and sexuality. And in one ad for example they had a scene where one man is on top of the other he is beating him and another man is standing by and sort of weeping into his hands over this kind of an activity, and here you get the combination of sadism, masochism with the sexual domination and humiliation of the underdog together with the observer. There always has to be an observer in this process to make it pornographic, consequently you have the physical pain, you have the moral humiliation, the extolling of the perpetrator of the act and you have humiliation of the individual underdog. You have all the symbolisms and you have the observer standing by in a very passive way observing and weeping over this activity.

Q. What is the next criteria Doctor?

A. The next criteria is the fact that the content will be substantially on a conventional customary limits of candor which I answered to before.

[fol. 46] Another criteria is the fact that there is variety in these pictures. You get all kinds of males here ranging from the most feminine in appearance to the most masculine. You have males ranging in ages from 12, 14 up until 30, 35, you have people of all nationalities, you have what they call dual-photos combinations of partners together and you have negroes symbolisms and you have

Indian symbolisms and all these symbolisms which in the ordinary culture reflects something about sexual adequacy or potency so you have a wide range of variety to appeal to any individual no matter who he is, a choice of his particular problems. The other criteria is that there is no truthful description of reality as is experienced by the individual reader. This is all that comes with an idea. A person who reads this for example a 98 pound weakling he doesn't look like this but this is a person that he wants to be, ideal, ideal and the highlighting of the focusing of the camera giving exaggeration of various parts cover the attitude of limitless potency by awaking to the barrier, the symbols, etc. These are all fantasies, these are not real except for these particular individuals and for the observer or spectator or reader. This does not constitute a purposeful presentation of the truth but ostensible distortion of the truth in order to provide erotic stimulation.

Now these are exhibitionistic. The other criteria is that whenever you have a warrior you have an exhibitionistic the people who look at these are the people who need to see and need to find out so you have one half of the card in here you have the exhibitionist, the person who buys this is the person who needs to visually experience sex so this does appeal to persons who have certain displacements of the natural sexual instinct into other activities.

The next criteria is that sexuality presented in some of these pictures is so vague and so indefinite that you don't know whether the person is a man or a woman. It is either done by highlighting or by specific selection of a model and therefore you have what is called an A sexual sexuality. You have a neuter gender which is neither masculine nor feminine and of course this appeals to the interest of the homosexual.

The other aspect is, the other criteria is that there is [fol. 47] particular emphasis upon the sexual areas of the body. Now those areas which are concerned primarily with procreation or defecation or with excretion, so by various camera techniques and various methods of cutting and nodding, etc., you do get to focus not on the whole person as an individual or as a personality but the particular body part which the individual reading it derives stimulation from.

And the next criteria is that all these persons, the models represent the monotonous personality presentation or appearance they are all infantile and their expression is rather dull and unexpressive so you have a neuter kind of emotional kind of expression which the individual can project whatever emotions he particularly feels into the picture or themselves so if you look carefully at these pictures you will see no personality within the models all you will see is some sort of a blank or lack of maturity which the observer will project into it and this satisfies certain laws of perception and behavior in psychology.

Another aspect of pornography is that the adjectives and the word pictures which go along with some of these photos are all without substance. They all describe the models in various tremendous terms but they have no particular substance to them just merely a string of adjectives which are mental stimuli to the individual. Throughout the whole book and the whole series of books in evidence there is no development of any theme or any plot or any consistent narrative, message or essay here, but just a matter of stereotype repetition of pictures so these are really picture books rather than books which contain some idea or some message.

Another aspect is that you have no direct contact with the creator or the producer of this information. You are in an art gallery looking at an artist's work you have some idea of Rembrandt's personality, what he was trying to convey to you, etc., but here you don't know who produced this all you see is the product and consequently there is no relationship between the observer and the reader of the material. This is another index of pornography.

And of course the last criteria are in terms of the effects on the individual. If this material does arouse in an ob- [fol. 48] scene way or sexually stimulate a person to carry out certain forms of behavior, then it is pornographic. So these are the criteria which are isolated in the literature of my research and are presented and adapted here for analysis of this material.

Q. One point of clarification Doctor, I noted that you stated that in these magazines there was an A sexual sexuality to some of these photographs. Could you explain a little more fully what you mean by that?

A. Well the model is either so immature in his facial expression and in his general appearance that you are not sure whether he is a boy or girl, a male or female and there is a highlighting profile shot of the dimples, breast development of the male so you are not sure what you are looking at, whether this is a male being photographed or a female and on the various techniques of trying to combine both male and female into the powerful unit of one.

Q. Would it be fair to summarize these criteria somewhat along the following lines that the dominant theme of these publications taken as a whole is one of arousing a prurient interest in the audience to whom they are addressed or directed to the homosexual?

A. Not only the dominant theme, but the only theme.

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Whereupon DR. MICHAEL MILLER, being duly sworn in by the Judicial Officer, testified as follows:

Direct examination.

By Mr. Dietz:

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Q. But at no time whatever have you exposed these people to pictures so that you could have concrete evidence on which to testify what their action might be in the viewing of such pictures, am I correct on that?

A. Specifically not with that intent, No. I mean if they brought up the subject we discussed it and analyzed it and observed their reactions but I did not specifically attempt to confront them with pictures.

Q. Well Doctor, isn't it so that—

A. Excuse me, the reason I didn't do this was that in our psychotherapy we considered it relatively unimpor-
[fol. 49] tant and I will tell you why because in the development of homosexuality, the factor of pictures have proven to be irrelevant in other words that pictures is not what creates the homosexual. What creates the homosexual is an abnormal relationship of the child to the parent and unbalance there in this relationship and emotional imbalance which has nothing to do with pictures. This is

a pipe dream that some one dreamed up there is nothing about the development of homosexuality. Homosexuality is a functional dynamic developmental process you see and it starts early in his life before the child is even aware of pictures.

Q. You mean to say that it is an acquired condition, is that it?

A. It is a functional acquired condition, Yes.

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Q. Well, as I understand the testimony you are proposing is not so much as to whether this picture or that picture would excite a homosexual rather than no pictures would excite a homosexual?

A. I wouldn't say this, I would not say that no pictures would excite a homosexual. I would say that pictures for the most part have little impact on most homosexuals and they would have impact mostly on those homosexuals who were frustrated and denied and could not obtain satisfaction and this would be kind of sublimating experience for them in the same way that pin-up girls were a sublimating experience for boys during the war, in the trenches.

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By Mr. Dietz:

Q. Now you have all the exhibits in front of you from 1 through 11, have you had opportunity prior to today to look through those magazines?

A. Yes, I have had an opportunity to look through most of them.

Q. Would you check them over to make sure that you have seen through all of them.

(Witness taking material from his leather briefcase before him, magazines of a light nature before him.)

A. There are several here I haven't seen.

Q. Well would you look through them please?

Have you looked through all the books Doctor?

A. Yes.

[fol. 50] Q. Now I ask you Doctor in your opinion whether to the average person apply contemporary community

standards to the material depicted in those books taken as a whole would appeal to the prurient interest of said average person?

A. The average person I believe would not appeal to the prurient interests in fact I don't think the average p.rson would be interested.

Q. All right, Doctor, I ask you whether to the average adult person adding on normal adult whether to the average normal adult person apply contemporary community standards the dominant theme of the material you have just looked at and the books in evidence taken as a whole would appeal to the prurient interest of the average normal adult?

A. In my opinion it would not.

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Q. Now Doctor for children at the Juvenile Clinic and in your other experience working with children as a psychiatrist is it your opinion that a child who looks at this material would or could become a homosexual?

A. Certainly not.

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Cross examination.

By Mr. Mindel:

Q. Doctor you say the average person or the average normal person would be likely to buy these magazines that Mr. Dietz has said.

A. I don't think the average normal person would be likely to buy the magazines except such persons as might be interested in physical development.

Q. Well is the last a firm statement of yours that such persons would buy those persons interested in physical development?

A. Well I believe that persons interested in body building and physical development such as might buy the Bernard McFadden Publication might show an interest in this kind of a magazine.

Q. You have concluded that this is a physical culture magazine?

A. It is primarily from what I gathered in intent a physical culture magazine.

Q. Have you had experience at physical culture and body building?

[fol. 51] A. Well I haven't gone in for it myself.

Q. Do you feel that you can recognize a physical culture magazine when you see it?

A. I had seen physical culture magazines, I had seen McFadden's publication.

Q. You say these are the same as McFaddens?

A. They are not exactly the same but they resemble McFaddens publication in many ways, in appeal to the beautiful body muscular development advice on body building.

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Q. Since you find it in this magazine you have this reaction that it is in poor taste, is that correct?

A. Well, I don't see too much point in it although there may be individuals who will like to see the physical development of the shoulders, the back and legs and so on. I mean this is a matter of individual opinion.

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Q. Assuming as we do isn't it a fact that many people, some people do buy this magazine, assuming as we do again it is a fact that some people respond to these advertisements would it be fair to say that it is likely that the persons who do buy the magazine respond to the magazine have a homosexual interest?

A. No.

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Q. Dr. Miller, you said the average normal person the average normal adult person because he has no interest in this magazine will not buy the magazine. I believe that publisher said that he sold approximately 25,000 copies of each issue and he has four different magazines so each month approximately it sells about 1,000 (sic) copies or indicates that—that indicates that he has an audience of some kind does it not?

A. It indicates that there is some audience, very often a high percentage of this publication is sold to the curious.

Q. Let us assume that a person buys this month in and month out would you say he has a special interest in it of some kind?

A. Well, it is possible, but you see the point is that if an individual interprets an object such as the human body or any aspect of the human body or any other object as [fol. 52] erotic or sexual, this is an individual reaction you see and individuals will always react just as Justice Douglas opinion of the Roth case, individuals will also act in their own individual way not take away this right of freedom and thought is attacking the essence of the first amendment according to Douglas and I think it is—but we are not only attacking constantly I think that is something basic in our constitutional rights but I think we are attacking the whole concept of the human body itself is immoral.

Q. I don't think it is proper for this witness to discuss the legal philosophy of the law.

Would you consider it extraordinary Dr. Miller that homosexuals would have a special interest in these magazines?

A. I wouldn't consider it extraordinary that some homosexuals would. But as I said by and large my experience has been that homosexuals are not particularly interested.

Q. You have no idea then what particular person is the regular buyer of this kind of a magazine?

A. Well, I am not familiar with the persons who have subscribed to the magazines if that's what you mean. I can only form an opinion.

Q. Do you have an opinion?

A. Well I would say that the youngster, the curious, some who are interested in physical development believe this to be a physical culture magazine and are interested in building the body, body building has received tremendous emphasis in our society, big muscles are important, athletics and physique is upheld very much, at unfortunately the cost of certain other values, and I would say generally youngsters with curiosities are interested in physical culture would be the primary buyers.

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Q. I just want to ask you on one picture Dr. Miller this is on page 23 of the April Issue of Manual.

Mr. Dietz: Exhibit one.
Mr. Mindel: Exhibit one.

(Doctor retrieving same.)

[fol. 53] A. Which page?

Mr. Mindel: 23.

Q. You see that picture?
A. Yes.
Q. Would you put that in the same classification as the human backside picture which you defined as poor taste?
A. No. I don't think so, I think this is a picture that—I don't see anything too unusual about it.
Q. Excuse me did you finish your answer?
A. Yes.
Q. Do you class this as a physical culture picture within the term as you were using it?
A. No, I would think of that more as a pose which a male model might make. I've seen them make similar poses in front of an art class.

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Dr. S. Gordden Link,

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Direct examination.

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By Mr. Dietz:

Q. Have you ever done any censorship work with photographs?
A. Yes. I was a member of the Zero Class of Military Intelligence. The Zero Class was the first class to be graduated in censorship by the Army before the official Number One Class for historical record.
There were, I think sixteen of us who were put on immediately. My first military assignment was as a Postal Censor attached to the New York Post Office on Military duty and in that capacity worked extensively with pictures, subsequently I became Chief of the Pictorial Intelligence

Section of G2 at the Pentagon and handled, I suppose, millions of pictures.

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Q. Dr. Link, I show you exhibits one through eleven and ask you if you are familiar with these magazines?

(Witness receiving joint exhibits 1 through 11.)

A. I am just checking for a moment. I have to check the list of the ones that I looked at but I want to make sure. Yes.

[fol. 54] Q. You are familiar with these magazines?

A. I looked through them, yes.

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Q. Doctor, I ask you sir, in your opinion whether to the average person the dominant theme of the material contained in that magazine, exhibit #1, would appeal to the prurient interest of said average person?

A. When you say "average person", then obviously the answer is no.

Q. All right, then, doctor, to the average normal adult person, would the material contained therein be the dominant theme thereof, appeal to the prurient interest?

A. So long as you say "average person" or "average adult person", the answer has to be no. This would not appeal to the prurient.

Q. Now, all right, would you look at exhibit #2, sir?

(Witness so doing.)

Q. (Continuing) I ask you sir, whether or not to the average person, the dominant theme of the material contained in exhibit #2 would appeal to the prurient interest?

A. Not to the average person. I think with respect—sir, am I permitted to enlarge on my answer or do I just say yes or no?

Mr. Dietz: By all means you can enlarge on your answer.

The Witness: So long as you say "average person" or "average adult" with respect to any of these pictures, the answer has to be no, that there would be no appeal to the prurient. I regard myself as an average person and my

only interest in these pictures is to compare them with the pictures I used to collect when I was in my teens and interested in in body building.

I have a feeling that even now, in my advanced age, I reflect the benefits of having collected Bernar McFadden and having taken the Earl Lederman course when I was in my teens and my first reaction was that these pictures are just about the same kind of pictures that I used to have at Earl Lederman, except that I think that Earl Lederman had a somewhat better specialized physique than some of the young men here.

Q. All right then, I ask you, sir, as to the remaining [fol. 55] exhibits three through eleven. I ask you whether to the average person the dominant theme of the material contained in each one of these magazines would appeal to the prurient interest?

A. With respect to all of these if there is any appeal to the prurient interest then the person concerned is not an average person.

Q. All right. Now, would you take exhibit #1, please sir, April 1960 issue of Manual magazine, and open to the first page, sir. Now, on the first and second pages are photographs of a young male wearing what would be called a posing strap or which has been referred to by Dr. Caprio as a "G" string. In your opinion sir, would these pictures —and please look at them carefully—would these pictures appeal to the prurient interests of the average person?

A. Well, I think we have covered that. Speaking for average people, I should say that I know there is no reason why this should appeal to the prurient.

Now, people might object to one aspect or another of these pictures, but certainly they could not be on the grounds on the effect on them personally or on their prurient interests.

Q. Does the depiction of pubic hairs in any way in these two photographs on pages one and two, affect your opinion?

A. No. Speaking for average male people, if this were a picture of a female model, there might be a different kind of reaction. I don't know, but with respect to average adults there is no reason why a peripheral pubic hair revelation should incite anything.

Mr. Mindel: What page is that, I'm sorry?

Mr. Dietz: One and two.

The Witness: First opening page.

Mr. Dietz: Excuse me, that is two and three, Your Honor. May I correct that? The numbered pages are two and three, it is the first page in the book.

Q. All right, Doctor, would you turn to page 12, please?

(Doctor turning to page 12.)

A. Yes.

Q. Now, in the lower left hand corner there is a picture [fol. 56] of a young male in a seated position?

A. Yes?

Q. In your opinion would that picture appeal to the prurient interests of the average person?

A. Not the average person, no.

Q. Would you turn to page 18?

A. Yes, I have it.

Q. Now, the photographs depicted on pages 18 and 19, would they appeal to the prurient interest of the average person?

A. No. It might appeal to the critical impulse because that is a very peculiar expression the man has on his face, but I don't think you are interested in his face.

Q. Now, on page 20, directing your attention particularly sir, to the posing strap or "G" string, that this young male is wearing, would that appeal to the prurient interests of the average person?

A. No.

Q. Now, on page 22 and page 23,—first page 22, would that appeal to the prurient interests of the average person?

A. No. I should think that my previous answers would have covered all of the pictures on the assumption that I had looked through these.

Q. All right, doctor, the picture on page 23, wherein the man is wearing Texas boots?

A. Yes?

Q. Would that appeal to the prurient interests of the average person?

A. You mean because of the boots?

Q. Because of the boots fetishism?

A. Well, there you have brought up an interesting point. This whole business of fetishism is particularly important and it does open up a whole new line of discussion, I should say.

I brought some magazines here which may have not been exposed to people here, McCall's.

Q. What issue?

A. And Ladies' Home Journal. I've got the April 1960 issue of McCall's and I am sure this magazine has never been investigated.

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Mr. Dietz: In the April, 1960 issue of McCall's—

The Witness: May I correct that to March, 1960 of McCall's?

By Mr. Dietz:

Q. That issue which you are holding in your hand, are there any other examples of fetishism?

A. Well, here now, is an example of a picture that could [fol. 57] have a very bad effect on some segments of the population because there are people who are victims of what is known as "foot fetishism". Fetishists hate being connected with sex, of course from time immemorial, I suppose. Graft and Padosky have done some rather interesting notes on them. There are men who will take this kind of picture home and will be so excited by the fact that these are female shoes in connection with feet that presumably they were on, that this will set in operation all sorts of curious sexual behavior patterns.

Now, you can—can't undertake I think to try to prevent the vulnerable people in the population from exposure to the kind of things to which they are especially vulnerable. I should not for a moment think of suggesting that McCall's be investigated because they have catered unknowingly I am sure, to the foot fetishes.

Q. All right now, going back to exhibit #1, the center fold of the book, I believe it is the next page.

(Witness finding page in exhibit #1.)

A. Yes?

Q. And what is your opinion as to that photograph?

A. Well, so long as you stick to your frame of reference, the average adult, I can't see how that would appeal to any prurient impulse.

Q. Now, Doctor, in your opinion does that photograph depict good body building, poor body building, muscular structure?

A. Well, it is a particularly good trapezius and a fairly good back, he has got a good trim pelvic girdle, evidently, come from weight lifting. Can't tell too much about his legs, they seem rather large but his shoulders and back and his upper arm muscles are particularly good especially in the right arm, the trapezius area.

Except that I am not qualified you know to appear as a witness on physical aspects except that I am not weight lifting and physical exercise myself.

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Mr. Dietz: Now, doctor, would you turn to page #35, sir. This is a photograph of a young man with a "V-shaped" garment.

[fol. 58] The Witness: Yes.

Q. Would that photograph appeal to the prurient interest of the average person?

A. No, sir; certainly not the average person.

Q. Would you turn to page #39, sir?

(Witness turning to page #39.)

Q. (Continuing) And now the picture in the lower left corner, underneath the arrow, does that depict to you, sir, a photograph of a male or a female?

A. Well, I don't understand the question. This is obviously a young man.

Q. That is the answer, Your Honor.

A. Also speaking nonmedically, you know.

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Q. Now, doctor, would viewing books of this nature or photographs—when I say "books of this nature", I am referring to exhibits #1 through #11, that are before you, would viewing books of this nature turn a young man into

becoming a homosexual if he was not predisposed to becoming a homosexual?

A. Well, the way you phrase that question there is no way I could possibly answer it except by saying no. Just exposure to pictures or literature or lectures will certainly not change the entire sexual orientation of the individual concerned.

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Cross examination.

By Mr. Mindel:

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Q. Now, Dr. Link, in view of your statements, is it likely, [fol. 59] do you think that the so-called average normal adult would buy these magazines?

A. Well, as I pointed out, I used to buy magazines of the physical culture variety because I was interested in body building. I have seen some pictures here that could have a particularly good effect on a man that was trying to do body building. Now, I am not qualified as an expert on art so I can't say that men who are artists would buy magazines like this for art purposes although I have been told that it is so.

All I can say is that from my own experience I used to collect Bernar McFadden—I don't know if anybody remembers him, and other physical culture magazines and they were very similar to these as I recall them.

Q. I'm not sure you quite answered my question. Perhaps you have as to whether in view of your previous testimony you would say that it is likely that the average normal adult person would buy this magazine?

A. Well, the average adult person is not a body builder, but those among the average adult population who are interested in physical development could very well buy them. I would assume that.

Q. You say "very well", what does that mean?

A. It just means what I say. I am not qualified as an expert to say what the general public will do. I'm not familiar with marketing or purchasing practices. You

asked me a matter of opinion. My opinion is a form of body builder that somebody who is still interested in musculature is that there are some people in the average population who would read these magazines and buy them merely because of the models involved.

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Direct examination.

By Mr. Mindel:

Q. State your whole name.

A. Harry J. Simon, S-i-m-o-n.

Q. And what position do you hold, Mr. Simon?

A. Postal Inspector.

Q. You are stationed in Washington, are you not?

A. I am.

Q. What generally is the scope of your duties as an Inspector.

A. Investigation of the use of the mails by suspected dealers in obscene matters.

[fol. 60] Q. During investigations, have you had occasion to talk with Dr. Womack, the operator and publishers of the various magazines involved here?

A. I have.

Q. Can you tell us what (sic) you first met with Dr. Womack?

A. I believe it was about March, 1959.

Q. And did he come to your office for any purpose?

A. My first contact with him was by telephone and he later came to my office about that time.

Q. At that meeting, Inspector, did you discuss with him any of the magazines in issue here?

A. There was a discussion about the magazine entitled, Trim.

Q. Can you tell us whether, during that discussion, there was any reference to the advertising in the magazine?

A. There was.

Q. Can you relate the extent of that discussion? As to the advertising?

A. To the best of my recollection, Mr. Womack's attention was called to the fact that the number of advertisers

or some of the advertisers in Trim had been involved in criminal actions, for using the mails in connection with obscene matter. And he was informed by mailing out such publications, he is possibly violating Section 1461 of Title 18, in giving information where obscene matter may be obtained.

Q. Did you have another meeting with Mr. Womack subsequent to the one that you just referred to?

A. I did.

Q. And at the second meeting, was there a discussion of any of the three magazines involved in this case?

A. Yes.

Q. Did that discussion involve reference to the type of persons who would read the magazine?

A. Yes.

Q. Can you state on the record to what extent the reference in that discussion was with Mr. Womack?

A. That discussion took place in your office during April of 1959, at which time Mr. Womack took a call with respect to the magazine entitled, Fizeek, and I sat in on that conversation. At that time, Mr. Womack did make the remark that magazines of this type were purchased by homosexuals.

Q. And in referring to this type, did he specifically make [fol. 61] reference to his own magazine?

A. Fizeek, he was talking about specifically.

Q. Did you have still another meeting with Mr. Womack?

A. I did.

Q. Was there any other Inspector present at that meeting?

A. Yes, sir.

Q. Can you state who that was?

A. That was Postal Inspector Boyd Fielder.

Q. What was the prime purpose of that meeting, can you state?

A. That meeting which took place on July 31, 1959, was for the purpose of fixing responsibility for the operation of a mail order business known as Continental Artists, and also responsibility for a separate promotion known as International Art Institute, which was being operated at Franklin Station, Washington, D. C. Post Office.

Q. And did you establish who the operator or operators of these businesses are?

A. I did.

Q. Will you state who?

A. According to Mr. Womack, he was the sole owner and operator of Continental Artists, which was responsible for the entire operation; with respect to International Art Institute, he informed me that the owner was a Mr. C. W. R. Benson of Tucson, Arizona, who was the publisher, or owner, rather, of a publication known as Grecian Guild Pictorial. Mr. Womack was printing this publication for Benson. Mr. Womack further mentioned the Post Office box—the box was mentioned and Mr. Womack picked up the mail addressed to that firm and forwarded it intact to Benson in Tucson.

Q. That is for Grecian Guild Pictorial?

A. No, International Art Institute.

Q. You say that Grecian Guild Pictorial at that time was owned by Benson, is that correct?

A. Yes, sir.

Q. And you discussed with Mr. Womack at that time, the ownership of Trim Magazine? Did he state from whom he had purchased that?

A. Yes, at that time, he indicated that he had purchased Trim sometime previously from Benson.

Q. What was your purpose in attempting to establish ownership of Continental Artists?

[fol. 62] Mr. Dietz: Your Honor, this question and anything relating to Continental Artists has absolutely nothing to do with the hearing before Your Honor. Now, it is not going to hurt us for him to testify in that regard, but it is going to make the record so much larger with just surplus matters. I object to the question, therefore.

Judicial Officer: I think I can see the purpose, however, because isn't it : fact that this magazine, that he is talking about, one of these ads appears.

Mr. Dietz: Continental Artists? No, Continental Artists are in no magazines.

Judicial Officer: Well, I thought that the—oh, that's the one that Mr. Womack owns, and the magazines contain an ad as to where these may be obtained, is that it?

Mr. Mindel: Let me clarify on it.

Mr. Dietz: No magazine contains an ad where Continental Artists can be contacted.

Judicial Officer: Let me hear from Mr. Mindel.

Mr. Mindel: Continental Artists is a separate business operated by Mr. Womack. Mr. Womack is also President of the corporation which published the four magazines before you. Continental Artists is the name under which he mailed certain articles which were the subject of this recent conviction under 1461. We would hope to get in some evidence of the type of material he was selling under that name. Our position, of course, on this whole matter before you is that these magazines are sold to homosexuals and knowingly designed and sold to homosexuals by Womack, and the type of material sold in Continental, we should want to show is along the same lines so as to establish further the awareness of this publisher as to the type of clientele he was catering to.

Mr. Dietz: Based upon Mr. Mindel's statement, I would therefore affirmatively object to any information regarding Continental Artists. I don't think that it is in any way relevant. He states himself that it was an entirely separate business subject to a separate court action in the United States District Court for the District of Columbia, and has nothing to do with the matters before Your Honor. [fol. 63] Judicial Officer: I think I will take the answer. Overrule the objection.

By Mr. Mindel:

Q. I believe the last question, Mr. Simon, what was your purpose in attempting to establish responsibility or ownership with Continental Artists.

A. My purpose in talking to Mr. Womack about Continental Artists and International Art Institute was preparatory to presenting the matter to the United States Attorney for consideration of criminal action.

Q. Did you caution Mr. Womack with respect to his rights in the matter, to give you that information, in the light of that last statement of yours?

A. He was fully advised of his constitutional rights before I proceeded with the questions.

Q. Did Mr. Womack make any statement to you during this third interview with respect to the readership of the magazines, Trim, Grecian Guild Pictorial, Fizeek?

A. He did. I don't know whether reference was made to specific magazines, but it was related to publications of that type, particularly those that were discussed with him at that time.

• • • • • • •

Q. And was it thereafter that he made the general comment that you made reference to?

A. Yes.

Q. And can you state what that comment was?

A. He was substantially—it was substantially to the effect that, as adults we don't have to kid each other, we know who is getting these magazines and pictures of the type that he was then selling under the name of Continental Artists.

Q. Did he say that he knew who would be buying it?

A. Yes.

Q. And did he say who they would be?

A. Homosexuals.

• • • • • • •

By Mr. Mindel:

Q. Can you state what the practice is of the type of dealer that I have just referred to in selling obscene pictures through the mail?

A. Yes.

Q. Will you describe it?

A. Well, I frequently found it to be the case where it is necessary to make a number of purchases before you obtain what you might call extremely pornographic material or [fol. 64] hard core pornography. They sometimes send you borderline material in the earlier purchases, but if you continue to purchase from some of these dealers, you are successful in obtaining the hard core pictures.

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Cross examination.

By Mr. Dietz:

Q. Now, Mr. Simon, when did you first have the conversation with Dr. Womack regarding the advertisers, as you put it, listed in the directory of any of those magazines?

A. To the best of my recollection, it took place during March of 1959.

Q. All right, now, Mr. Simon, is it not a fact that Dr. Womack told you at that time or at any other time, that you had discussed advertisers listed in the directory of his magazines, that he would drop any advertiser or any listing in his directory upon your informing him that the person named had been convicted?

A. He did.

Q. All right, now, pursuant to that, did you notify Dr. Womack that one person named James Hill had been finally convicted and was a person listed in his directory?

A. I did.

Q. And is it not a fact that thereafter, the name of James Hill was deleted from the directory of contributors to the magazines in question.

A. I recall that that name remained in the magazine for some time after my first discussion with Mr. Womack in calling his attention to the fact that Hill had been convicted, although several of the other names of people I have mentioned have been deleted.

Q. All right. Do you know when you told Dr. Womack about James Hill? I mean, about his being convicted, of course?

A. I don't recall whether it was in the March conference with him or whether it was in July.

Q. And did Dr. Womack ever tell you that the name of James Hill might have been already printed in some magazines so that it could not be immediately deleted, but would be deleted upon the next time the magazine was made up and the printing was set up?

A. He might have, but I don't recall.

[fol. 65] Q. Has Dr. Womack ever refused to take, to delete, from his directory the name or names of anyone that you have informed him was finally convicted?

A. Will you repeat that question please?

Q. I say, has Dr. Womack ever refused to delete from his directory the names of any photographer or contributor to his magazines after your having told Dr. Womack that the contributor or photographer had been finally convicted?

A. No.

Q. Now, you testified, Inspector Simon, regarding a third interview with Dr. Womack, where a reference was made by Dr. Womack to Fizeek magazines in general. I ask you, sir, at that time, did Dr. Womack not tell you, sir, that you were both adults, there was no sense fooling, fooling each other, that he knew that homosexuals could be buying this type of magazine, meaning physique magazines in general field?

A. Yes.

Q. Now, the exhibit that we have regarding magazines, photographing physiques, which is Exhibit C, Your Honor, by Tony of Vulcan Studio, to your personal knowledge, sir, was this magazine not distributed by Continental Artists and not by Tony of Vulcan Studios in New York?

• • • • • • •

A. That was offered for sale by Continental Artists.

Q. And not by Tony of Vulcan Studios in New York?

A. To the best of my knowledge, it was not.

Q. And have you ever found a list of Continental Artists in any of the magazines in question here?

A. No.

Q. All right. Now, in Exhibit 2, Mr. Simon, would you please turn to the directory in the rear, which is on page 45—44, excuse me.

A. I have it.

Q. All right, do you find a listing in the magazine for Vulcan?

A. I do not.

Q. Now, in Exhibit 4, –by the way, that Exhibit 2, what month is that?

A. May 1960.

Q. And this Exhibit 4, which is March 1960 issue, do you find on the directory, a listing for Vulcan?

A. I do.

[fol. 66] Q. And is it not a fact, sir, that in about January of 1960, this party known as Tony, Tony Guither, do you know him by that name?

A. I've heard of him.

Q. Tony Guither closed down his photography studios in New York?

A. I have heard that he went out of business.

Q. So actually he was out of business when these magazines went on sale, the March and May issues of Trim, is that correct?

* * * * * * *

Q. From anyone listed in that directory?

A. I have.

Q. And from whom was that?

A. Oh, I have purchased from several different dealers during the past year. I recall—recall specifically James Hill's. There was a man named Woods in California, that I had ordered from directly, from Trim or one of these other publications of Mr. Womack's, M. C. Woods is the name in Glendale, California. I don't recall any others at this time.

Q. Mr. Simon, is it not a fact, sir, that Dr. Womack, dropped the name of M. C. Woods from his directory, to your knowledge, sir?

A. I don't believe it appears in this later issue, the May issue, but it does in the March issue.

Q. Had you ever told Dr. Womack to delete the name of M. C. Woods?

A. I did not because I was not aware of any criminal action against Mr. Woods.

Q. But at any rate, it was deleted on Dr. Womack's own motion, was it not?

A. It was deleted from the May catalogue.

Q. All right. Now, do you know a gentleman named Rodney Crowther, who was a photographer?

A. I do.

Q. And is it not a fact that Dr. Womack, to your knowledge, deleted Rodney Crowther's name as a contributing photographer from his directory?

A. I know that he has.

Q. How about a photographer who trades under the name of Quirk?

A. I don't believe I mentioned that name to Mr. Womack.

Q. But do you know that photographer?

A. I know about him.

Q. And is it not a fact that Dr. Womack, on his own motion, deleted that name, that photographer, from his directory?

[fol. 67] A. I see the ad in the March 1960 issue, but I don't believe it appears in the May issue.

Q. All right. And how about a photographer who trades under the name of Minor?

A. That appears in the March directory, but I never discussed that name with Mr. Womack.

Q. But at any rate, that was deleted, was it not, from his directories?

A. I haven't examined the two sufficiently, but I don't believe it is in the May issue. I don't see it in the directory.

Q. Now, is it not a fact, at least with the party, Crowther, that Dr. Womack informed you that he had—when I say "he", Dr. Womack had conducted exactly the same procedure that you followed, and sent out a test letter to obtain the type of material that Crowther was sending out, and therefore he was deleting Crowther's name from the mailing directories, is that correct?

A. I don't recall that that was the reason for deleting the name, but he did mention that he had obtained pictures from Crowther to purchase, and that he was using the mails for the purpose of distributing pictures of male nudes.

Q. And is it not a fact that Dr. Womack then deleted Crowther's name from the directory, to your knowledge?

A. It was deleted in subsequent issues of publication, but I don't remember with what issue.

Q. I show you Exhibit 1, MANual, pictures of Bugs Geel, which are on pages 26 and 27.

A. Yes.

Q. These are in evidence, Your Honor. These are the photographs that were referred to before. Those photographs have the heading DeZign on it, is that correct?

A. Yes, sir.

Q. And that, as you say, is Frank Collier ads.

A. Yes.

Q. Has Frank Collier ever been finally convicted?

A. On a local charge, but not on a federal charge. It is still pending. He is under indictment, both in Norfolk and the District of Columbia.

Q. Now, the federal charge would encompass sending things through the mail. The local charge would be, as I understand it, of having materials available for sale. Is that correct?

A. Possession and sale.

* * * * * * *

Q. This gentleman, Tony Guither in New York, to your [fol. 68] knowledge, sir, has he ever been convicted of sending anything through the mails or possession of obscene materials?

A. I am not aware of it. I have no information to that effect.

* * * * * * *

Q. Now, Inspector Simon, is it not a fact that since the first visit you have had with Dr. Womack, whether in your office or his office or any telephone conversation, Dr. Womack has always indicated to you that he knew that you were receiving copies of everything that he sent through the mails?

A. He said that.

* * * * * * *

Q. And is it not a fact, sir, that on many of the occasions which you have had opportunity to speak to Dr. Womack, that he has told you at any time you tell him that what he is sending through the mails is obscene, he will discontinue that business?

A. He mentioned that to me on at least two occasions.

Q. Have you ever informed Dr. Womack that in your opinion, as a Postal Inspector, any of his materials were obscene?

A. I told him I could not inform him along those lines.

Q. So that you have never told him that in your opinion, as a Post Office Inspector, what he is sending through the mails is obscene material?

A. That is right. I told him it was not my function to advise him what is or what is not obscene.

Mr. Dietz: That's all I have, Your Honor.

* * * * * * *

RICHARD S. FARR

* * * * * * *

Cross examination.

By Mr. Dietz:

* * * * * * *

Q. All right. Now, did Dr. Womack, during that conversation, state that he had no way of knowing how many homosexuals purchased these magazines?

A. I don't recall anything along that line specifically.

Q. Did he not state that these magazines were sold pri- [fol. 69] marily at newsstands?

A. Yes, he did.

Q. —and that he had no way of knowing or checking as to who purchased these magazines from the newsstands?

A. Yes, that's true.

* * * * * * *

SAUL S. MINDEL having first been sworn by the Official Officer, took the stand and testified as follows:

Examination by Mr. Farr:

Q. Please state your name?

A. My name is Saul S. Mindel, and I am chief of the Mailability Section of the Post Office Department.

Q. Mr. Mindel, you have subscribed and sworn to a statement which has been tended to this hearing this afternoon?

A. Yes, I have.

Q. Did you testify that this statement is in all respects true and represents your present recollection of the occurrences in the events set forth in this affidavit?

A. It does.

Mr. Dietz: Cross examination.

Cross examination.

By Mr. Dietz:

Q. Mr. Mindel, referring to the first page of your statement, the paragraph that the mailer stated he felt probably that about 50 percent of the readers are homosexual males and 50 percent are interested in physical culture, at that time, did Dr. Womack inform you that he had no way of knowing just who purchases these magazines, because they were sold through newsstands?

A. I don't recall that specific statement, but I do recall clearly, "Well, let's not kid ourselves, we know who is buying this magazine, and that is homosexuals," when I made the suggestion that it was homosexuals that were buying it. That's what I recall.

• • • • • • •

Mr. Dietz: Your Honor, I ask for a ruling.

A. No, I did not, because there was no occasion for it.

Q. Did you advise him that anything he said might be used against him in any future hearing, regarding his magazines?

[fol. 70] A. Mr. Womack sought me out to make certain statements and that was one of them.

Q. Sir, you didn't answer my question. Did you advise him?

A. I told you I did not.

Q. Is it not a fact, Mr. Mindel, that at any time you have discussed these magazines and their possible audience, the purchasers of these magazines, you have always insisted to Dr. Womack that these magazines were purchased by homosexuals chiefly?

A. You say at any time I have spoken with Mr. Womack —on two occasions only. The two referred to are in this affidavit. In this first one, I made the suggestion to him that this was probably the audience, and frankly, he picked up the suggestion with such alacrity that I was astonished that he made such a clear admission of the type of audience that this was going to.

Q. How about at the second meeting?

A. You were present at the second meeting, and you recall, as Mr. Farr has just testified, how we led up to that point and at first Dr. Womack resisted the idea and denied that he had said that at the first meeting, but finally he did agree that he did say it at the first meeting and that was a fact.

Q. Do you have your shorthand notes on that second meeting?

A. My shorthand notes are very sketchy on that second meeting.

(Receiving yellow papers.)

Q. You never had them typed up, sir?

A. It is my practice, Mr. Dietz, to make notes like these and keep them in untranscribed form until there is some occasion, but this particular occasion, as you can see, there is only one page in issue. You recall we were there a couple of hours, so obviously this is very sketchy.

Q. Do you have any shorthand notes as to what Dr. Womack said, his actual words, which you have paraphrased and concluded as, "he agreed"?

A. I am reading these over. I don't see anything in these notes on that point.

Q. Did you read those shorthand notes over before you dictated this affidavit which you have subscribed, which we are considering here?

A. Yes, but as to this part of it, of course, I was depending on my own recollections, because this was actually an outstanding part of the meeting when you and Mr. Womack were present with Mr. Farr and myself.

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[fol. 71]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Case No. 1450—'60

1. MANUAL ENTERPRISES, INC., a body corporate, 2. TRIM ENTERPRISES, INC., a body corporate, 3. GRECIAN GUILD, a body corporate, 1318—14th Street, N.W., Washington, D. C., Plaintiffs,

vs.

ARTHUR E. SUMMERFIELD, Postmaster General of the United States Post Office, Washington, D. C., Defendant.

COMPLAINT FOR INJUNCTIVE RELIEF—Filed May 13, 1960

Plaintiffs, by their attorney, Stanley M. Dietz, complain of the defendant as follows:

1. The amount in controversy exceeds $3,000.00, excluding interest and costs, and is within the general equity jurisdiction of this Court and Rule 65 of the Federal Rules of Civil Procedure.

2. Plaintiff, Manual Enterprises, Inc. is a District of Columbia corporation, organized and existing under the laws of the District of Columbia, and is engaged in the business of publishing a monthly magazine named "Manual," with a monthly distribution in of 25,000 issues, of which approximately 12,000 issues are circulated through the United States mail. "Manual" magazine sells for 50¢ per copy.

3. Trim Enterprises, Inc. is a District of Columbia corporation, organized and existing under the laws of the District of Columbia, and is engaged in the business of publishing a bi-monthly magazine named "Trim", with a bi-monthly distribution of 25,000 issues, of which approximately 12,000 issues are circulated through the United States mails. "Trim" sells for 50¢ per copy.

[fol. 72] 4. Grecian Guild is a District of Columbia corporation, organized and existing under the laws of the District of Columbia, and is engaged in the business of publishing a bi-monthly magazine named "Grecian Guild Pictorial," with a bi-monthly distribution of 25,000 issues, of which approximately 12,000 issues are circulated through the United States mails. "Grecian Guild Pictorial" sells for 50¢ a copy.

5. The April issue of "Manual" is now in transit in the United States mail. The May issue of the magazine "Trim" is now in transit in the United States mail, and the next issue of said magazine for July, 1960 will be placed in the United States mail in May of 1960. The May issue of the magazine "Grecian Guild Pictorial" is now in transit in the United States mail, and the bi-monthly issue for July, 1960 will be placed in transit in the United States mail during the month of May, 1960.

6. The defendant, Arthur E. Summerfield and his Post Office Department officers, agents, servants, employees and attorneys have in the past harassed the plaintiffs by withholding from transit in the mail the plaintiffs' magazines, declaring same to be obscene under the terms of 18 U.S. Code 1461 (Postal Manual 124.31) and have threatened in the future to withhold from the mails plaintiffs' magazines. The March and April issues of "Manual" magazine have unjustly and inequitably been withheld from the mails. The March and May issues of "Grecian Guild Pictorial" have been so unjustly and inequitably withheld from the mails. Upon receiving notice of the withholding from dispatching in the mails, the plaintiffs have the alternative to withdraw said issues from the Postal Department, then trucking same by interstate carriers, or appealing the action of the Post Office Department through administrative procedures. The costs of transporting the withheld issues by interstate truckers is prohibitive to the plaintiffs.

7. On April 21, 22, and 25, the plaintiffs attended administrative hearings in the Postal Department before the judicial officer of the Post Office Department, in which numerous exhibits were presented and testimony of both

lay and expert witnesses was taken. The preponderance of the expert testimony showed that the magazines in question would not appeal to the prurient interest of the average normal person in the community, but that said maga- [fol. 73] zines would appeal to the prurient interest of the homosexuals. The preponderance of the lay testimony showed that some four advertisers in the magazines, out of approximately sixty advertisers and contributors to the magazines would after numerous and persistent requests, deliver and sell photographs of male nudes to a purchaser. The lay testimony further showed that the plaintiffs had no knowledge of what said four advertisers were selling and that the plaintiffs, upon being informed that *any* of its advertisers or contributors had been convicted did delete from its magazines the works of said advertiser or contributor. Thereafter, on April 28, 1960, the Chief Judicial Officer of the Post Office Department entered a finding that the magazines of the plaintiffs were non-mailable under Title 18 U.S.C. 1461, as being obscene and as giving information as to where, how, and from whom obscene materials may be obtained, which said finding of the Judicial Officer is contrary to the law of the United States as interpreted by the Supreme Court of the United States in numerous cases.

The defendant's unlawful and inequitable actions aforesaid in withholding from the mails the plaintiffs' magazines are subjecting the plaintiffs to continuing and irreparable injury, which actions of the defendant should be immediately restricted and enjoined; failure to immediately restrict and enjoin the defendant will subject the plaintiffs to further irreparable injury and continuing deprivation of their means of livelihood. All of the defendant's actions are calculated by the defendant to censor and harass plaintiffs and are a prior restraint designed to deprive the plaintiffs of their rights under the First Amendment of the Constitution of the United States of America.

8. Copies of the plaintiffs' magazines are attached hereto as exhibits and included by reference herein to support the plaintiffs' allegations that said magazines are not obscene under the provisions of Title 18 U.S. Code 1461 (Postal Manual 124.31).

9. No injury could result to the defendant or to the public through this Court's immediate restraining and enjoining the defendant's unlawful and inequitable actions aforesaid.

[fol. 74] Wherefore, the premises considered, plaintiffs pray the Court for the following relief:

1. That defendant be restrained and enjoined pendente lite and permanently from withholding from dispatch through the mails of the plaintiffs' magazines pending the final decisions of the courts of competent jurisdiction.

2. That plaintiffs have such other and further relief as to the Court is just and reasonable.

Stanley M. Dietz, Attorney for Plaintiffs, Manual Enterprises, Inc., Trim Enterprises, Inc., Grecian Guild, 1406 G Street, N. W., Washington, D. C.

Duly sworn to by Herman L. Womack, jurat omitted in printing.

In United States District Court

Motion for Preliminary Injunction—Filed May 13, 1960

Now Comes the plaintiffs, by their attorney, Stanley M. Dietz, and moves the Court for an Order granting a Preliminary Writ of Injunction against the defendant, Arthur E. Summerfield, Postmaster General of the United States, his officers, agents, servants, employees and attorneys from withholding from dispatching through the mails of plaintiffs' magazines "Manual", "Trim," and "Grecian [fol. 75] Guild Pictorial", pending this suit and until further Order of the Court upon the grounds and in accordance with the prayers as set forth in the Complaint filed herein, namely that the defendant's unlawful and inequitable actions in withholding from dispatching through the mail of plaintiffs' magazines based upon the finding of April 28, 1960 by the Post Office Department Judicial Officer that said magazines are non-mailable under Title 18 U.S.C. 1461 are causing plaintiffs to suffer immediate and irreparable injury, loss and damage.

Defendant and the Public will suffer no prejudice or injury by the granting of this Motion.

Stanley M. Dietz, Attorney for Plaintiffs

NOTICE

To Arthur E. Summerfield
Postmaster General of the United States Post Office,
Washington, D.C.

Please take notice that the Rules of this Court require that if you oppose the granting of this Motion, you, or your counsel, shall within five (5) days from the date of said service of a copy of the attached Motion upon you, or such further time as the Court may grant, or as the parties to this suit may agree upon, file in reply with the Clerk of this Court a statement of the points and authorities upon which you rely, and serve a copy thereof upon counsel for the plaintiffs.

Stanley M. Dietz, Attorney for Plaintiffs

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

1. *Roth* v. *United States*, 354 U.S. 476, at page 489, Justice Brennan. The test of obscenity: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" page 502. At page 489, "The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well emcompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press." At page 502, Justice Har-
[fol. 76] lan, "I agree with the Court, of course, that the books must be judged as a whole and in relation to the normal adult reader."

2. *Sunshine Book* v. *Summerfield*, 128 Fed. Supp. 564, 101 U.S. App. D.C. 358; 249 F. (2d) 114; 355 U.S. 372.

3. *Sunshine Book* v. *Summerfield*, 95 U.S. App. D.C. 169, 221 F. (2d) 42.

4. *One, Inc.* v. *Oleson*, 241 F. (2d) 772; 355 U.S. 371.

5. *Smith* v. *California*, 28 L.W. 4033.

AFFIDAVIT OF HERMAN L. WOMACK IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION—Filed May 13, 1960

District of Columbia) ss.:

Herman L. Womack, upon his oath being first duly sworn according to law, deposes and says that he is President of Manual Enterprises, Inc., President of Trim Enterprises, Inc., President of Grecian Guild, that of the monthly distribution of "Manual Magazine" of approximately 25,000 copies, approximately 755 are mailed directly to subscribers, the balance are sold through the mails to newsdealers; that of the monthly distribution of "Trim Magazine" of approximately 25,000 copies, approximately 825 are mailed directly to subscribers, the balance are sold through the mails to newsdealers; that of the monthly distribution of "Grecian Guild Pictorial Magazine" of approximately 25,000 copies, approximately 785 are mailed directly to subscribers, the balance are sold through the mails to newsdealers. That the affiant has no way of knowing the nature of the purchasers of his magazines, does not now and never has known whether the purchasers of plaintiffs' magazines are or are not homosexuals and the affiant verily believes it would be impossible to ascertain whether or not the readers of plaintiffs' magazines are homosexuals.

Herman L. Womack

[Jurat this 12th day of May 1960]

[fol. 77]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANT FOR SUMMARY JUDGMENT—Filed May 19, 1960

Defendant by and through his attorney, the United States Attorney, moves this Court for summary judgment in his behalf upon grounds that there exists no genuine issue as

to material fact and defendant is entitled to judgment as a matter of law. In support of this motion there is filed herewith and incorporated herein by reference the record of proceedings conducted by the Post Office Department which consists of:

1. The administrative file certified by the General Counsel Post Office Department and marked as Government's Exhibit A;

2. Joint exhibits 1 through 11 and Post Office Exhibits A through T, marked as Government's Exhibit B;

3. Transcript of hearing before Post Office Department's Judicial Officer, pages 1 through 408, marked as Government's Exhibit C.

STATEMENT OF MATERIAL FACTS UNDER LOCAL CIVIL RULE 9(1)

The statement of material facts as to which the moving party contends there is no genuine issue as required by Local Civil Rule 9(1) is the entire record of the administrative proceedings attached to this motion and made a part of it. The statement of facts set out in defendant's memorandum of points and authorities accompanying this motion is not intended to fulfill the requirements of the aforementioned rule but is only meant to be a summary of facts extracted from the record.

Oliver Gasch, United States Attorney, Edward P. Troxell, Principal Assistant United States Attorney, John F. Doyle, Assistant United States Attorney, Robert J. Asman, Assistant United States Attorney.

Of Counsel, Saul J. Mindel, Esq., Post Office Department.

[Certificate of Service.]

[fol. 78]

In United States District Court

Answer to Motion for Summary Judgment— Filed May 24, 1960

Now come the plaintiffs by and through their attorney and answers the motion for summary judgment herein as follows:

1. The basis of the Post Office Judicial Officer's decision in brief is that the magazines in question would appeal to the prurient interest of a homosexual reader and would not appeal to the prurient interest of the average, normal adult member of the community and therefore, are obscene, is in conflict with the decision of the United States Supreme Court in the case of *Roth* v. *United States*, and therefore should not be allowed to stand by this Court.

2. The expert witnesses who testified at the Post Office Department hearing all stated that they were not experts in the field of body building and weight lifting and physical culture and therefore their testimony must be limited by their own qualifications in that regard as they could not testify as to what interest persons other than homosexuals might have in the magazines in question.

3. The affidavit submitted in support of the motion for preliminary injunction herein clearly shows that no one is capable of stating who the purchasers of these magazines are, since they are mostly sold through newsstands to the general public.

4. Even if these magazines were purchased only by homosexuals they would fall under the protection of the First Amendment of the Constitution of the United States of America as set forth by the Supreme Court of the United States in the case of *One, Inc.* v. *Oleson*.

5. The finding of the Judicial Officer of the Post Office Department that the magazines contained advertisements as to where, how, or from whom obscene material may be obtained is erroneous, since the publishers of these maga-

zines cannot be charged with knowledge of any type as to the nature of the materials sold by the advertisers under the ruling of the Supreme Court in *Smith* v. *California*.

Wherefore, plaintiffs assert to the Court that defendant's [fol. 79] motion for summary judgment should be denied and plaintiffs' motion for temporary injunction should be granted as prayed therein.

Stanley M. Dietz, Attorney for Plaintiffs

[Certificate of Service.]

In United States District Court

Plaintiffs' Motion for Summary Judgment—
Filed June 8, 1960

Now come the plaintiffs, by and through their attorney, and move this Court for summary judgment herein.

Plaintiffs herein are publishers of magazines, copies of which are attached to the complaint herein, which plaintiffs pray the Court to include by reference in this Motion. This case presents four issues:

1. Whether the magazines in question are obscene within the literal meaning of Title 18, Section 1461, U. S. Code.

2. Whether the magazines in question are obscene within the literal meaning of Title 18, Section 1461, U. S. Code, as containing advertisements of where, how, from whom, and by what means obscene material may be obtained.

3. Whether the Post Office by the procedures it employed exercised unconstitutional prior restraint upon the magazines in issue.

4. Whether Title 18, Section 1461, U. S. Code is or is not constitutional.

So far as issues Numbers 1 and 4 are concerned, the statutory and constitutional questions coalesce. The Supreme Court in the *Roth* case, 354 U.S. 476, sustained pertinent Code Section 18 U.S. Code 1461 prior to its

Amendment on the ground that obscenity lies outside the protection of the constitutional guarantees of the First Amendment. The Supreme Court, in that case, thoroughly defined "obscenity." The ambit of the statute, then, cannot constitutionally be broader than the Court's definition of obscenity. Of course, the statute is to be interpreted as [fol. 80] broadly as the Constitution allows. In the administrative hearing before the Post Office judicial officer, it was the magazines on trial. The affidavit of Herman L. Womack, in support of the motion for temporary injunction herein, must be considered in relation to the transcript of the proceedings held at the Post Office, and is included herein by reference for the Court's consideration in deciding this motion. In the *Roth* case, the Supreme Court defined obscenity in terms of what it is, and in terms of what it is not. The expression of ideas that have the "slightest redeeming social importance" was held by the Supreme Court to be constitutionally protected. To be obscene, these magazines must be empty of any ideas of even the slightest redeeming social importance. The Court must conclude that physique magazines, also popularly termed body building magazines, have significant social importance to a large segment of the population of the United States. The Supreme Court in *Sunshine Book* v. *Summerfield*, 355 U. S. 372, and in *Mounts* v. *United States*, 355 U.S. 180, and in *One, Inc.* v. *Oleson*, 355 U. S. 371, has cited the *Roth* decision as its basis for reversing the lower courts. In the *Roth* decision, the prior law laid down in *Regina* v. *Hicklin*, L.R. 3, Q.B. 360, was discarded, and the test is no longer that which the Post Office argued through the judicial officer, i.e., that these magazines would appeal to the prurient interest of a particularly susceptible group. No one is able to assert with definiteness whether or not purchasers of these magazines are exclusively members of a particularly susceptible group, i.e., homosexuals, as set forth in the affidavit of Herman L. Womack. Plaintiffs argue these magazines must be judged according to their effects upon normal, healthy adults having applied contemporary community standards. This does not allow for a dissent in matters of taste even if the magazines in question could be considered as hateful to the prevailing climate

of public opinion; they would still have constitutional protection of the First Amendment. The Supreme Court's negation of the *Hicklin* rule surely does not mean that a Gallop Poll must be conducted nor may we consider the possible effect upon children or emotionally disturbed readers, illiterates, etc. If these magazines would not appeal to the prurient interest of an average, normal, adult they are not obscene and are constitutionally protected. Photographs portrayed in these magazines are not better, [fol. 81] and no worse than those portrayed in such leading magazines as *Esquire, Gentry, Rogue, Duke, and Playboy* magazines which the Post Office would not dare to argue are obscene. A salacious reader who might purchase one of these magazines from a book store is more likely to feel cheated than excited. But the effect of these magazines on such erratic or abnormal readers does not set the constitutional limit on freedom of speech and press. At the hearing before the judicial officer, counsel for the Post Office Department urged that the intent of the publisher should control. Actually, the intent of the publisher is irrelevant herein, because it is the magazines themselves which the Court must base its decision upon, surrounding circumstances being irrelevant.

Regarding Point 3, the Post Office conducted an unconstitutional prior restraint on these magazines. It first held the magazines to be nonmailable without notice or hearing allowed the publisher and deprived the plaintiffs of the use of the mails. After pressure exerted by this Court, the Post Office Department held a time-consuming hearing, the product of which was an Order contrary to the established law of the United States, which Order based upon the grounds given could have been propounded without any hearing at all. This amounts to the most obnoxious and unconstitutional censorship. The principal effect of the administrative hearing at the Post Office Department is to delay action of this Court. The hearing examiner at the Post Office could not possibly qualify as an administrative expert. Plaintiffs assert that the Post Office has conducted an ex parte administrative prior restraint treading upon an area of constitutional sensitivity apart from the substan-

tive problems of determining whether or not the magazines are obscene.

Referring to the second point of this argument upon consideration by this Court of the decision of the Supreme Court in *Smith* v. *California*, it is clear that no publisher is responsible for the unknown actions of its advertisers any more than any book dealer is responsible for the contents of books for sale from his shelf of which he knows not the content. In all cases arising under Title 18, Section 1461, U. S. Code as set forth in his concurring opinion in the *Roth* case, by Chief Justice Warren page 495, the important element is that these things be done knowingly.

[fol. 82] Referring to the fourth point of this argument, appellant asserts that the 1958 Amendment 18 U.S. Code, Section 1461 is so vague and indefinite that it does not meet the requirements of due process of the Fifth Amendment in that, as amended, the pertinent language: "Whosoever * * * knowingly causes to be delivered by mail according to the direction thereon, or in the place at which it is directed to be delivered by the person to whom it is addressed * * * " is meaningless. Further, plaintiffs argue that the entire civil procedure followed by the Post Office based upon a criminal statute raises doubts of constitutionality. The fragile foundation on which the Post Office action rests must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review. It is this Court's duty to defend substantive constitutional rights when attacked from a source itself of doubtful constitutional validity. There is lacking here the kind of specific legislative direction to the administrative agency that in certain circumstances justifies judicial deference to administrative determinations. It is the magazines before this Court that are on trial, not the publishers, although the Post Office has taken the contrary view, by attempting to prohibit from the mails any magazines in which Herman L. Womack has any interest since his conviction in this Court. Possibly the Post Office was not satisfied with the judgment of this Court and it is attempting to assert sanctions for

punishment upon Herman L. Womack exceeding this Court's judgment.

Respectfully submitted,

Stanley M. Dietz, Attorney for Plaintiffs

[Certificate of Service.]

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT—August 17, 1960

This case having come on for hearing upon plaintiffs' motion for preliminary injunction and upon defendant's motion for summary judgment and plaintiffs' cross-motion for summary judgment, and the Court having considered [fol. 83] said motions, opposition thereto, affidavits and exhibits filed therewith, the pleadings herein, and having heard argument in open court, and it appearing to the Court that the order of defendant, Postmaster General, complained of, was supported by substantial evidence and that the action of defendant, Postmaster General, was not arbitrary or capricious; and it further appearing to the Court that there exists no genuine issue as to material fact and defendant is entitled to judgment as a matter of law, it is by the Court this 17th day of August, 1960,

Ordered that plaintiffs' motion for preliminary injunction be and it is hereby denied, and it is

Further Ordered that plaintiffs' cross-motion for summary judgment be and it is hereby denied, and it is

Further Ordered that defendant's motion for summary judgment be and it is hereby granted and that the complaint be and it is hereby dismissed.

George L. Hart, Jr., United States District Judge.

Seen:

Stanley M. Dietz, Attorney for Plaintiffs.

In United States District Court

Notice of Appeal—Filed October 10, 1960

Notice is hereby given this 10th day of October, 1960, that Manual Enterprises, Inc.; Trim Enterprises, Inc.; Grecian Guild, a body corporate, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 17th day of August, 1960, in favor of defendant, Arthur E. Summerfield, etc. against said plaintiff Manual Enterprises, Inc.; Trim Enterprises, Inc.; Grecian Guild, a body corporate.

Stanley M. Dietz, Attorney for Manual Enterprises, Inc., Trim Enterprises, Inc., Grecian Guild, a body corporate.

[Mail copies to: Post Office, U.S. Atty, Justice Dept.]

[fol. 84]

Government's Exhibit "A"

Post Office Department
Washington 25, D. C.

P.O.D. Docket No. 1/246

In the Matters Concerning

Manual Enterprises, Inc., et al.

at

Washington, D. C.

Appearances:

Stanley M. Dietz, Esq.
1406 G Street, N.W.
Washington, D. C.
Attorney for the
Mailer-Petitioner

Richard S. Farr, Esq.,
James F. Harding, Esq.
and Saul J. Mindel, Esq.
Attorneys for Complainant-
Respondent, Post Office
Department

DEPARTMENTAL DECISION—April 28, 1960

In the above matter the General Counsel's Office of the Post Office Department on April 5, 1960, made a finding to the effect that the April issue of the magazine MANUAL was non-mailable under the terms of 18 U.S.C. 1461 (Postal Manual 124.31) and on April 11, 1960, the Mailer-Petitioner herein filed an appeal from this finding and requested a formal hearing of all the issues involved.

On the same day, April 11, 1960, the Judicial Officer entered an order herein setting forth that since it appeared from the verified appeal that the matter offered for mailing was of substantial value and quantity that the General [fol. 85] Counsel should initiate forthwith a complaint under the Post Office Department Rules of Practice and Proceedings Relative to Mailability.

On April 14, 1960, the General Counsel filed a complaint in which they alleged that certain parcels containing magazines placed in the mail at Alexandria, Virginia on March 25, 1960, on behalf of Manual Enterprises were non-mailable under 18 U.S.C. 1461, Postal Manual 124.31 and that 255 copies of the April 1960 issue of the magazine MANUAL, 75 copies of the May 1960 issue of the magazine TRIM and 75 copies of the May 1960 issue of the magazine GRECIAN GUILD PICTORIAL were obscene, lewd, lascivious and indecent as the dominant effect of each, considering pictorial and textual context taken as a whole, appeals to the prurient interests of the audience to whom they are intended to be directed or disseminated. A hearing on said complaint was set for April 21, 1960, and the matter assigned to a Hearing Examiner.

On April 14, 1960, the General Counsel's office, Complainant herein, moved to strike from the caption of this case "FIZEEK ENTERPRISES, INC." which was named

in this proceeding because of its inclusion as one of the plaintiffs in the related court proceeding *Manual Enterprises, Inc., et al.* v. *Summerfield*, U.S.D.C., D.C. Civil Action No. 1082-60, and for the further reason that there were no copies of FIZEEK magazine contained in the parcels presently withheld from dispatch as recited in the original complaint herein. This motion was granted.

On April 18, 1960, the Matter-Petitioner filed what was entitled appeal of TRIM ENTERPRISES, INC. and GRECIAN GUILD, a body corporate from the finding of the General Counsel's Office of the Post Office Department of April 7, 1960, and on April 18, 1960, the Complainant [fol. 86] filed a motion to amend the complaint by adding at the end of the first paragraph "and that said magazines provide information as to where, how and from whom obscene pictures may be obtained." Such amendment is allowed.

On April 25, 1960, an order which had been entered in the *Manual Enterprises, Inc., et al.*, plaintiff v. *Arthur E. Summerfield*, defendant, Civil Action No. 1082-60, in the United States District Court for the District of Columbia and which had been filed in said court on April 14, 1960, was received by the Judicial Officer and made a part of this file. In this order it appears that the motion of the plaintiff in that case for a preliminary and permanent injunction was denied by the District Court and the complaint was dismissed without prejudice with the proviso "that if the Post Office Department has not acted finally and completely in the matter by April 28, 1960, the plaintiff may seek further relief from the court."

On April 25, 1960, a stipulation of procedures signed by both parties was filed herein in which MANUAL ENTERPRISES, INC. et al., P.O.D. Docket No. I-246 and FIZEEK ENTERPRISES, INC., P.O.D. Docket No. I-235 were consolidated for hearing, which hearing it was agreed therein would be presided over by the Judicial Officer and at that hearing testimony and evidence would be received on the mailability of FIZEEK as well as the magazines MANUAL, TRIM, and GRECIAN GUILD PICTORIAL and that the questions and issues of fact and law involved in the matter of the application of FIZEEK for second-class entry would

be heard at a subsequent date to be determined by agreement by the parties and that the Judicial Officer shall enter two separate orders—one dealing with the mailability question on the issues of MANUAL, TRIM and GRECIAN GUILD PICTORIAL now being withheld from dispatch [fol. 87] from the Alexandria, Virginia, Post Office and the other order dealing with the application of FIZEEK for second-class entry. Further that the transcript for the consolidated hearings shall remain as a part of the physical record in Docket No. 1246 and would be incorporated by reference in pertinent parts in the record in the FIZEEK second-class entry proceeding (P.O.D. Docket No. 1235), and that the Judicial Officer enter his final orders herein without the filing of exceptions by the parties.

In accordance with said stipulation and the pleadings on file herein, the Departmental Decision in this matter will be confined to the question of mailability of the magazines TRIM, MANUAL and GRECIAN GUILD PICTORIAL, and the questions and issues involved in the application for second-class entry for the several issues of FIZEEK magazines shall be subject to a separate Departmental Decision in that matter following further hearing on the application for second-class entry therein.

Full and complete hearings were had before the Judicial Officer on April 21, 22 and 25 and on both April 21st and the 25th the hearings ran several hours past the usual time for adjournment and into the early evening hours in an effort to expedite and conclude the hearings so as to meet the spirit of the order issued by the District Court as above set forth.

Numerous exhibits were entered by both parties—the Mailer-Petitioner having introduced copies of the magazines in question here as exhibits numbered one through eleven—the first four of which were magazines involved in this decision and the balance being copies of the magazine FIZEEK which is concerned in the second-class entry case as above set forth.

[fol. 88] Expert witnesses were called on both sides. The Respondent-Complainant produced Dr. Frank Caprio, a practicing psychiatrist who has had considerable experience in the treatment of homosexuals and who testified at

length regarding the effect of the pictures in the magazine in which the subjects were posed in such a fashion as to focus attention on the genitals or buttocks of the male subjects and the emphasis thereon was heightened by tight revealing coverings, by their postures, by the contrasting dress of the subjects of pictures on the same or opposite pages and by the overall context of the publications. Dr. Caprio further testified that the readers of said publications would consist of male homosexuals and that these publications would have a malevolent effect upon some adolescent males should they fall into their hands.

The testimony of Dr. Caprio was supported also by the testimony of Dr. Joseph D. McGovern, a psychologist, and it was stipulated between the parties in the interest of expediting the hearing that another witness of the Respondent-Complainant herein, Dr. John H. Cavanaugh, a physician, who is also a psychiatrist, would testify to the same facts and opinions as did Dr. Caprio.

The Mailer-Petitioner produced Dr. Medrad Miller, as an expert witness whose practice involved psychiatry in the treatment of homosexuals. Dr. Miller, who examined all the books in evidence, testified that the average normal person would not be interested in this type of publication — that these publications would not appeal to the prurient interests of the average normal person and that the books themselves would not make a homosexual out of an ordinary person. Dr. Miller further testified that the average [fol. 89] normal person would not be likely to purchase these publications but that some homosexuals would be interested in them. The Mailer-Petitioner likewise produced Dr. S. Gordon Link, a non-medical psycho-therapist who gave as part of his qualifications the fact that he was a practicing psychologist and was a fellow in the American Association of Social Psychiatry. He likewise testified that the dominant theme of the magazines in question here would not appeal to the prurient interest of the average person and that he did not believe any of these books would cause a young man to become a homosexual and that it would have no effect on the average adult but might conceivably have an effect on homosexuals. He admitting that the focusing of the attention on buttocks would have

an appeal to a homosexual and that some homosexuals might order the pictures advertised in the magazines and that the context of these magazines was important and that it would have an accumulative effect upon homosexuals.

Harry J. Simon, Postal Inspector testified he met Mr. H. Lynn Womack, the publisher of these magazines and owner of the organization of the Mailer-Petitioner in this case in March of 1959, when he, Mr. Womack, came to the witness' office to discuss the magazine TRIM. Mr. Simon at that time advised Mr. Womack that some of the advertisers in this magazine had been convicted of sending obscene matters through the mail and suggested that he, Mr. Womack, might be violating the law by furnishing information in his publications as to where obscene material might be obtained. The witness further testified that he discussed the April 1959 issue of FIZEEK and Mr. Womack admitted that this magazine was purchased by homosexuals. The witness further testified that on July 31, 1959, accom- [fol. 90] panied by Boyd Fielder, a Postal Inspector, he met Mr. Womack in connection with investigations being conducted on Continental Artists of which Mr. Womack is the sole owner.

There was considerable testimony of Post Office Inspectors and employees and many exhibits were introduced which tended to show that through the ads carried in the magazines here in question, the printing in each issue of a directory providing information as to where photographs and pictures of the type appearing in these magazines could be obtained tended to furnish information to show where obscene material could be obtained. The evidence also revealed how, following receipt of the initial order of pictures and photographs of the kind and type appearing in these publications, there would be follow-up circulars and solicitations from the advertisers, the persons or firms furnishing the pictures or those listed in the Directory, for other and further nude male pictures from these advertisers or others which would have a prurient interest to homosexuals. These procedures led finally to the receipt of *what is known as hard-core pornography* in the shape of photographs, sketches, pictures and colored slides of males engaged in sex acts with each other, which no one

would question were of the type that would appeal to the prurient interests of anyone who would have any desire to look at them.

It appears to the Judicial Officer that the record in this case clearly shows that the issues of the magazines TRIM, MANUAL and GRECIAN GUILD PICTORIAL in evidence here (Exhibits 1, 2, 3 and 4) consist almost entirely of photographs of young men in nude or practically nude [fol. 91] poses handled in such a manner as to focus attention on their genitals or buttocks or to emphasize these parts by tight revealing coverings, by the posture of the models, by contrasting dress on the same or opposite pages and by the overall context of the respective publications.

It further appears to the Judicial Officer that the contents of these magazines would not appeal to the ordinary male adult, that he would have no interest in them and would not buy them under ordinary circumstances and that the readers of these publications consist almost entirely of male homosexuals and possibly a few adolescent males and that these magazines would appeal to the prurient interest of those who do read them. Further, the publisher has admitted that the magazines are knowingly published to appeal to the male homosexual group.

It further appears to the Judicial Officer that there is no amount of literary, scientific or other material in these issues of the publications which would in any way offset the effect of the main contents of these magazines, namely, the published pictures.

It further appears to the Judicial Officer that the advertising contained in the several issues placed in evidence herein is of the same general character as the publication itself and would have the same general appeal to homosexuals and contains an implied promise of obscene pictures to those answering such ads and that in fact the pictures furnished by the advertisers in the magazines have a predominant appeal to the prurient interest of the male homosexual as do the pictures contained in the magazines themselves which as before stated is a prurient one so far as the homosexual is concerned and has the effect of sexual excitement to the male homosexual.

[fol. 92] It further appears to the Judicial Officer that the average reader of these magazines is the male homosexual and that each of the issues in evidence here considered fully as a whole in each instance appeals to the prurient interest of the average reader of such magazines and that the average male adolescent who might be attracted to each of the issues here involved would be in danger of the possible luring of such an adolescent reader into the abnormal paths of the homosexual.

Counsel for the Mailer-Petitioner contends that in order to be non-mailable these magazines would have to appeal to the prurient interests of the average normal person in the community. With this contention, I cannot agree. If they appeal to the prurient interest of those male homosexuals for whom they are admittedly published, those who actually purchase and read them then those whom they would be unlikely to reach and for whom they would have no interest, who would not purchase or read them, would not furnish a standard to judge the appeal they would have to those they are likely to reach. It is the effect they have upon the audience for whom they are published and who are interested in them and who would read them that is the important issue here presented.

The publisher of the issues here involved has deliberately planned these publications so that they would appeal to the male homosexual audience and thereby this particular group becomes the predominant audience who would buy and read these publications. Thus, the male homosexual becomes the "average" reader and these magazines do appeal to the prurient interest of the group who purchase and read these publications.

[fol. 93] It further appears to the Judicial Officer that the ads in the publications here involved are likewise clearly designed so as to attract the male homosexual and to furnish him with names and addresses where nude male pictures in poses and conditions which would appeal to his prurient interest may be obtained; that the pictures thus obtained would appeal to the prurient interest of such male homosexuals as would read and answer the ads therein contained and if followed up and fully pursued would

eventually lead to the procurement of so-called "hard-core" pornographic material.

The Judicial Officer has had the benefit of proposed findings of fact and conclusions of law submitted by the Mailer-Petitioner and likewise of those submitted by the Complainant-Respondent and in this connection the argument attached to the findings and conclusions of the Complainant-Respondent contains a very exhaustive and quite complete statement of the law covering the legal questions here presented and has been of great benefit to the Judicial Officer in conserving time and research in order that a speedy Departmental Decision in accordance with the Rules of Practice in these hearings as well as the wishes of the District Court might be reached.

I therefore determine that the several issues of the magazines here involved and each of them is obscene, lewd, lascivious and indecent so as to render each and all of them non-mailable under 18 U.S.C. 1461 for the reason they have as their dominant theme and effect taken as a whole an appeal to prurient interest considering their effect upon the average reader for whom they are designed and published and who are the special audience to whom they are directed, and to whom the magazines are sold and by whom they are read.

[fol. 94] I further find that the magazines give information as to where, how and from whom obscene materials may be obtained in violation of 18 U.S.C. 1461 as determined by the tenor of the advertisements and by the kind and nature of the pictures furnished pursuant thereto as disclosed by the evidence and exhibits in the record.

The proposed findings of fact and conclusions of law including the argument, which contains an excellent brief of the law pertinent hereto, as submitted by the Complainant-Respondent are hereby adopted and the proposed finding of fact numbered three submitted by the Mailer-Petitioner as well as conclusions of law numbers one and two submitted by him are hereby rejected. Mailer-Petitioner's proposed findings of fact numbers 1 and 2 are covered by similar findings in those submitted by Complainant-Respondent and are adopted.

I therefore find that all of the magazines or publications here involved; namely, the April 1960 issue of MANUAL (Exhibit 1), the May 1960 issue of TRIM (Exhibit 2), the May 1960 issue of GRECIAN GUILD PICTORIAL (Exhibit 3) and the March 1960 issue of TRIM (Exhibit 4) are nonmailable under 18 U.S.C. 1461.

/s/ RAYMOND J. KELLY
Raymond J. Kelly
Judicial Officer

[fol. 95]

GOVERNMENT'S EXHIBIT G

TRIM *Young America's Favorite Physique Publication*

P.O. Box 385
Washington 4, D.C.
CO 5-5540

10 September 1958

Mercury Photographic Service
P.O. Box 2
Norfolk, Virginia

Dear Bob:

Thank you very much for your interesting cooperation. I have selected one print of Frankie Smoot for the November issue of TRIM.

Ricky Ojeda is a very good model and so is Joe Fabio. The Underwood Guild sent me almost nothing—what they sent me has been printed, with the exception of two prints which I have on hand. This is good, in a way, in that you do not have to worry about duplicating anything from the negatives which you bought from them.

In looking over your catalog, I would say that the following boys appear to be very good candidates in TRIM: David, Steve, Danny, Buster, Bob Stevens, and Buddy Hobson. These are all younger and, unless your descriptions are too misleading, are the kinds of models toward

which TRIM is admittingly oriented. Underwood sent me a couple of pretty sad prints on Bill Westley. There is a great difference between "young" and "Sexy." Westley, if he has been photographed properly, has the potential sex appeal and drawing power that is characteristic of so many of the Vulcan models. In any case if we follow through with our plan of your sending me the selector catalogs, we can save time, money and effort all around.

In as much as you are just launching your own business, I will proffer a couple of observations. In 1958, physique fans want their "truck driver types" already cleaned up, showered, and ready for bed. You will find that Smoot will not be a great seller because he is just too cluttered up. Secondly, it is absolutely essential that the models have pretty faces and a personality not totally unrelated to sex appeal. Of the three boys which you have sent to me, Ojeda is your best bet. I may be wrong and offer the above only in the hope of assisting you rather than appearing dogmatic. Let me hear from you.

Cordially,

/s/ Lynn
Lynn

[fol. 96] (Envelope)

T R I M
P.O. Box 385
Washington 4, D.C.

Mercury Photographic Service
P. O. Box 2
Norfolk, Virginia

[fol. 97]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,072

MANUAL ENTERPRISES, INC., *et al.*, Appellants,

v.

J. EDWARD DAY, Postmaster General, Appellee.

Appeal From the United States District Court for the District of Columbia

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OPINION—March 23, 1961

Mr. Stanley M. Dietz for appellants.

Mr. Donald Smith, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney, and Carl W. Belcher, Assistant United States Attorney, were on the brief, for appellee. Mr. Frank Q. Nebeker, Assistant United States Attorney, also entered an appearance for appellee.

Before Fahy, Danaher and Bastian, Circuit Judges.

BASTIAN, *Circuit Judge*: In April, 1960, postal officials determined that three magazines, "Manual," "Trim," and "Grecian Guild Pictorial," (hereinafter referred to as appellants), were non-mailable under 18 U.S.C. ¶ 1461 as being obscene and as conveying information as to how and where obscene matter might be obtained. Pursuant to this determination, copies of the magazines were withheld for dispatch. Shortly thereafter an administrative [fol. 98] hearing was conducted, in which appellants participated, which ended adversely to appellants. Suit for injunctive relief was then filed in District Court. Appellants' motion for preliminary injunction was denied. On cross-motions for summary judgment, appellants' was denied, and appellee's was granted. This appeal followed.

The magazines in question are physique magazines, composed almost exclusively of photographs of nearly nude

male models. Each photograph is accompanied by a brief caption giving the names of the model and photographer. Each issue also contains an index listing the photographers who have contributed to that magazine and a few advertisements from photographers and studios offering collections of nude photographs.

At the administrative hearing psychiatrists testified in great detail, explaining how and why the poses used in most of the pictures and the clothing worn by the models would arouse great prurient interest in homosexuals. Psychiatric testimony was also given to the effect that certain objects (swords and chains) used in some of the pictures were primary symbols of sexual fantasies of deviants within the homosexual group.

A postal inspector testified that, using an assumed name, he submitted orders to some of appellants' advertisers and received from them photographs of nude males with the pubic area exposed to view. He further testified that, in his experience, additional orders would produce photographs progressively more lascivious. Investigations at the studios which mailed the particular photographs here involved resulted in the discovery of what was termed "hard core pornography," photographs of groups of nude males engaged in homosexual activities.

Appellants contend that these magazines are body-building magazines, and that the publishers have no way of knowing whether newsstand sales are made to homosexuals or body-building enthusiasts. They further contend that they can not be charged with the photographs found in the course of the investigations because they were not sent through the mails and that the photographs which were actually sent are not obscene because nudity as such is not obscene.

[fol. 99] We think there was substantial evidence on the administrative record to support the conclusion that these magazines were intended for homosexuals. Overlooking the testimony that Herman Womack (the owner of two of the magazines and the publisher of all three) actually admitted such intent, the expert testimony as to the effect of the published pictures on homosexuals coupled with the obvious lack of relationship of the "posing straps," heavy boots, helmets, swords, and chains to any interest

in body-building, we think, amply supports the inference that these pictures were deliberately published because of their effect upon homosexuals.

Appellants contend that even if these pictures do arouse prurient interests in homosexuals, they are not obscene within the definition of *Roth* v. *United States*, 354 U.S. 476 (1957), the so-called "average person in the community" test. It seems to us that the real meaning of *Roth* is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. On the basis of the evidence before the administrative body, we think that "the average member of the community" would be an atypical reader of these magazines. The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. The finding that these magazines were obscene within the meaning of the statute is therefore affirmed.

The testimony of the postal inspector as to his experience in the progressive nature of the material sent through the mails by the advertisers, together with the photographs actually so sent and those seized at the same studios, we think, furnishes substantial evidence for the conclusion that the advertisements in these magazines did give in-[fol. 100] formation with respect to where, how and from whom obscene matter could be obtained. The foregoing omits consideration of whether the photographs actually sent through the mails were obscene. A prior decision of this court has held such matter to be obscene. See *Womack* v. *United States*, No. 15,749 —— U.S.App.D.C. ——, —— F2d —— (decided Jan. 12, 1961). This finding of the administrative body is likewise affirmed.

The judgment of the District Court is therefore

Affirmed.

FAHY, *Circuit Judge, concurs* in the result.

[fol. 101]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960

Civil 1450-60

No. 16,072

MANUAL ENTERPRISES, INC., *et al.*, Appellants,

v.

J. EDWARD DAY, Postmaster General, Appellee.

Appeal From the United States District Court for the District of Columbia

---

Before: Fahy, Danaher and Bastian, Circuit Judges.

JUDGMENT—March 23, 1961

This Cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On Consideraton Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian.

Dated: March 23, 1961.

Circuit Judge Fahy concurs in the result.

[fol. 103] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 104]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

123

Office-Supreme Court, U.S.
FILED
MAY 2[illegible]
JAMES R. BROWNING, Clerk

In the

United States Supreme Court

October Term, ~~1960~~ 1961

No. ~~1000~~

MANUAL ENTERPRISES, INC.,
A body corporate

TRIM ENTERPRISES, INC.,
A body corporate

GRECIAN GUILD,
A body corporate

Petitioners,

v.

J. EDWARD DAY,
Postmaster General of the United States

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In The

United States Supreme Court

October Term, 1960

No.

MANUAL ENTERPRISES, INC.,
A body corporate

TRIM ENTERPRISES, INC.,
A body corporate

GRECIAN GUILD,
A body corporate

Petitioners,

v.

J. EDWARD DAY,
Postmaster General of the United States

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Manual Enterprises, Inc., a body corporate, Trim Enterprises, Inc., a body corporate, Grecian Guild, a body corporate, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on March 23, 1961.

Citations to the Opinions Below

On March 23, 1961, the United States Court of Appeals for the District of Columbia Circuit, issued its decision and opinion affirming the granting of summary judgment in favor of respondent by the United States District Court for the District of Columbia on August 17, 1960, in Civil Action Number 1450-60. The case number in the United States Court of Appeals was 16,072 (A. 1a). Petitioners' magazines were judged obscene in violation of Title 18, U.S. Code Section 1461 (1958).

Jurisdictional Statement

The United States District Court for the District of Columbia had jurisdiction over this case. The decision and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March 23, 1961. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254.

Statement of Questions Presented

1. Whether the petitioners' magazines are obscene within the literal meaning of Title 18, Section 1461 United States Code.

2. Whether the respondent, through the post office procedures, exercised an unconstitutional prior restraint upon petitioners' magazines in violation of the First Amendment to the Constitution of the United States of America.

3. Whether petitioners' magazines are obscene as containing advertisements of where, how, from whom and by what means obscene material may be obtained in violation of Title 18, Section 1461 United States Code, and if the petitioners' magazines were found to appeal to the prurient interests of homosexuals, whether petitioners' magazines would come under the protection of the First Amendment to the Constitution of the United States of America.

Statutes and Rules Involved

The pertinent statutes are:

Amendment I to the Constitution of the United States. (App. 5a)

Title 18 U.S. Code Section 1461 (1958). (App. 6a)

Statement of the Case

Petitioners are the publishers of three magazines, "Manual," "Trim" and "Grecian Guild Pictorial." On April 5, 1960 the General Counsel of the Post Office Department, ex parte, determined these three magazines to be obscene and non-mailable and withheld from transit through the mails 255 copies of the April, 1960 issue of "Manual," 75 copies of the May, 1960 issue of "Trim" and 75 copies of the May, 1960 issue of "Grecian Guild Pictorial." These magazines were held by the Postmaster in Alexandria, Virginia. Thereafter, petitioners forced the Post Office Department to hold a formal hearing on the question of whether or not these magazines were mailable. The General Counsel for the Post Office Department on April 14, 1960 filed a complaint with the Judicial Office of the Post Office Department alleging that the three magazines were obscene and non-mailable and also that the magazines contained advertisements where, how, and from whom obscene matter may be obtained and therefore were non-mailable. To expedite the administrative procedures, petitioners stipulated to waive the hearing before a Post Office Department Hearing Examiner and consented to the Post Office Department Judicial Officer presiding at the hearing. The hearing was held at the Post Office Department April 21, 1960 through April 25, 1960. The Post Office Department Judicial Officer agreed with the General Counsel of the Post Office Department and held the several issues of the petitioners' magazines to be obscene and non-mailable and further to be non-mailable as containing advertisements as to where, how, and from whom obscene materials could be obtained, all in violation of Title 18 U.S.C. Section 1461. At the Post Office Department hearing both parties produced psychiatrists and psychologists, all of whom agreed that petitioners' magazines would not appeal

to the prurient interest of the average members of the community. No witness was qualified as an expert on body building, physical therapy or physical culture and all admitted ignorance of these matters. The Post Office Department psychiatrist testified that different photographs in each of petitioners' magazines, along with a myriad of other every day stimuli, could appeal to the prurient interest of different types of homosexuals. He also admitted that the photographs in petitioners' magazines were less revealing than the totally nude photographs which appear in several issues of "Sunshine and Health" nudist magazine, and other magazines as "Playboy." The Post Office Department attempted to prove that petitioners' president had made statements that the three magazines at issue were sold to homosexuals. Further, the Post Office Department attempted to prove to its Post Office Department Judicial Officer that some of the photographers contributing to petitioners' magazines advertised where, how, and from whom obscene matter could be obtained. This was accomplished by introducing obscene photographs seized from the homes and offices of the different photographers, but not obscene photographs which were sold through the mails by the different photographers. The Postal Inspector testified that he had difficulty in purchasing any obscene photographs from any photographer listed in petitioners' magazines when responding to an advertisement from petitioners' magazines. He further testified that petitioners' president had offered to delete the works of any contributing photographer to petitioners' magazines upon being notified by the Postal Inspector that said photographer had been convicted of any criminal offense. There was no direct testimony concerning the method of distribution of petitioners' magazines. The Post Office Department Judicial Officer was unconcerned with what materials would constitute the contemporary community standards in the magazine field and would not permit examination of the psychiatrists as to the effect of other magazines, generally accepted in the community and comparable to petitioners' magazines at issue, upon other sexual deviates and particularly susceptible groups of readers. On April 28, 1960 the Post Office Department Judicial Officer rendered his Departmental Decision holding petitioners' magazines to be nonmailable and on May 13, 1960 petitioners filed their

Complaint and Motion for Preliminary Injunction in the United States District Court for the District of Columbia which resulted in that Court's Order granting summary judgment to the respondent on August 17, 1960 from wh ch an appeal was taken.

The United States Court of Appeals for the District of Columbia Circuit on March 23, 1961 entered its decision and opinion (A-1a) affirming the action of the United States District Court for the District of Columbia Circuit. Apparently the United States Court of Appeals did not consider, in reaching its decision herein, any of the decisions of this Court, following this Court's decision, Roth v. United States, 354 U.S. 476, applying the protection of the First Amendment to the Constitution of the United States of America to magazines similar and comparable to the petitioners' magazines.

Reasons for Allowing the Writ

Point One

Whether the Petitioners' Magazines Are Obscene Within the Literal Meaning of Title 18, Section 1461, United States Code

So far as issues Number 1 and 2 are concerned, the statutory and constitutional questions coalesce. This Court in Roth v. United States, 354 U.S. 476, sustained pertinent Code Section 18 U.S. Code 1461, prior to its Amendment, on the ground that obscenity lies outside the protection of the constitutional guarantees of the First Amendment. The Court, in that case, thoroughly defined "obscenity." The ambit of the statute, then, cannot constitutionally be broader than the Court's definition of obscenity. Of course, the statute is to be interpreted as broadly as the Constitution allows. In the administrative hearing before the Post Office Judicial Officer, it was the magazines on trial. The affidavit of Herman L. Womack, in support of the motion for temporary injunction herein, must be considered in relation to the transcript of the proceedings held at the Post Office. In the Roth case, the Court defined obscenity in terms of what it is, and in terms of what it is not. The expression of ideas that have the "slightest redeeming social importance" was

held by this Court to be constitutionally protected. To be obscene, therefore, these magazines must be empty of any ideas of even the slightest redeeming social importance. This Court must conclude that physique magazines, also popularly termed body building magazines, have significant social importance to a large segment of the population of the United States. This Court in Sunshine Book v. Summerfield, 355 U.S. 372, and in Mounce v. United States, 355 U.S. 180, and in One, Inc. v. Oleson, 355 U.S. 371, has cited the Roth decision as its basis for reversing the lower courts and protecting ideas contrary to the prevailing climate of public opinion. In the Roth decision, the prior law laid down in Regina v. Hicklin, L.R. 3, Q.B. 360, was discarded, and the test is no longer that which the Post Office argued through the Judicial Officer, i.e., that these magazines would appeal to the prurient interest of a particularly susceptible group. No one is able to assert with definiteness whether or not purchasers of these magazines are exclusively members of a particularly susceptible group, i.e., homosexuals, as set forth in the uncontradicted affidavit of Herman L. Womack. Petitioners argue that these magazines must be judged according to their effects upon normal, healthy adults having applied contemporary community standards. The Post Office Department does not allow for a dissent in matters of taste. Petitioners' magazines are constitutionally protected even if they could be considered as hateful to the prevailing climate of public opinion; the Roth case held that they would still have the constitutional protection of the First Amendment. This Court's negation of the Hicklin rule surely does not mean that a Gallup Poll must be conducted nor may we consider the possible effect upon children or emotionally disturbed readers, illiterates, etc. If these magazines would not appeal to the prurient interest of an average, normal, adult they are not obscene and are constitutionally protected. Photographs portrayed in these magazines are not better, and no worse than those portrayed in such leading magazines as Esquire, Gentry, Rogue, Duke, and Playboy magazines which the Post Office would not dare to argue are obscene. A salacious reader who might purchase one of petitioners' magazines from a book store is more likely to feel cheated than excited. But the effect of these magazines on such erratic or abnormal readers does not set the constitutional limit on freedom of

speech and press. At the hearing before the Post Office Department Judicial Officer, counsel for the Post Office Department urged that the intent of the publisher should control. Actually, the intent of the publisher is irrelevant herein, because it is the magazines themselves which the Court must base its decision upon, surrounding circumstances being irrelevant.

Point Two

Whether the Respondent, Through the Post Office Procedures, Exercised an Unconstitutional Prior Restraint Upon Petitioners' Magazines In Violation of the First Amendment to the Constitution of the United States of America

Referring to the second point, petitioners assert that the administrative procedure followed by the Post Office, based upon a criminal statute, raises doubts of constitutionality. The fragile foundation on which the Post Office action rests must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review. It is the duty of the Courts to defend substantive constitutional rights especially when attacked from a source itself of doubtful constitutional validity. There is lacking here the kind of specific legislative direction to the administrative agency that in certain circumstances justifies judicial deference to administrative determinations. It is the magazines before this Court that are on trial, not the publishers, although the Post Office has taken the contrary view, by attempting to unconstitutionally prohibit from the mails any magazine in which Herman L. Womack has any interest.

The Post Office Department conducted an unconstitutional prior restraint on these magazines. It first held the magazines to be non-mailable without notice or hearing allowed the publishers and deprived the petitioners of the use of the mails. After pressure exerted by the United States District Court, at the instance of the petitioners, the Post Office Department held a time-consuming hearing, the product of which was an Order contrary to the established law of the United States, which Order based upon the grounds given could have been propounded without any hearing at all.

This amounts to the most obnoxious and unconstitutional censorship. The principal effect of the administrative hearing at the Post Office Department is to delay action of the Courts; it is no more than me arguing with myself over what I had already decided to do. The Judicial Officer of the Post Office could not possibly qualify as an administrative expert. Petitioners assert that the Post Office Department has conducted an ex parte administrative prior restraint treading upon an area of constitutional sensitivity apart from the substantive problems of determining whether or not the magazines are obscene.

Point Three

Whether Petitioners' Magazines Are Obscene As Containing Advertisements of Where, How, From Whom and By What Means Obscene Material May Be Obtained In Violation of Title 18, Section 1461, United States Code, And If the Petitioners' Magazines Were Found to Appeal to the Prurient Interests of Homosexuals, Whether Petitioners' Magazines Would Come Under the Protection of the First Amendment to the Constitution of the United States of America

Referring to the third point of this argument upon consideration of the decision of this Court in Smith v. California, 361 U.S. 147, it is clear that no publisher is responsible for the unknown actions of its advertisers any more than any book dealer is responsible for the contents of books for sale from his shelf of which he knows not the content. In all cases arising under Title 18, Section 1461, U.S. Code, as set forth in his concurring opinion in the Roth case, by Chief Justice Warren, page 495, the important element is that these things be done knowingly. There is no evidence that petitioners knew any contributing photographer was advertising obscene matter but rather the evidence showed that petitioners tried to avoid such contributing photographers by following the same procedures of sending "Test letters" as used by the Post Office Inspectors.

In its decision and opinion of March 23, 1961, the United States Court of Appeals for the District of Columbia Circuit apparently gave no consideration to the decisions of this

Court following this Court's decision in Roth v. United States, 354 U.S. 476. Petitioner cited to that Court in petitioners' brief, and argued, the decisions of this Court rendered in Sunshine Book v. Summerfield, 355 U.S. 372; Mounce v. United States, 355 U.S. 180; One, Inc. v. Oleson, 355 U.S. 371. Apparently, because this Court's decisions in those three cases consisted merely of granting of writ of certiorari and reversing upon the basis of Roth v. United States, 354 U.S. 476, the interpretation placed upon this Court's decisions by the Post Office Department, the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit, is that no one knows what this Court intended to do in those three decisions. Petitioners have argued, at all three hearings below, that this Court through its decisions intended that all ideas, containing even the slightest amount of socially redeeming value, are constitutionally protected, even though said ideas may be contrary to prevailing public opinion. This is the only reasonable interpretation that the petitioners could give to this Court's three decisions. However, the Courts below apparently preferred to sidestep these decisions. If this Court did not in its decision in One, Inc. v. Oleson, 355 U.S. 371, intend that ideas of a minority group, such as homosexuals, are constitutionally protected, then petitioners urge this Court to deny this petition for writ of certiorari. However, if this Court, in its decision in One, Inc. v. Oleson, 355 U.S. 371, intended to apply the constitutional protection of the First Amendment to the ideas of minority groups, even though such ideas are distasteful to the majority opinion, then petitioners urge this Court to grant a writ of certiorari in this case, so that the Courts below, throughout the United States, shall consider said decision of this Court and apply same, in fundamental determinations of obscenity, or non-obscenity, of questioned materials.

Petitioners urge this Court to clarify this all-important constitutional question. Petitioners' magazines are physique magazines. The United States Court of Appeals for the District of Columbia Circuit recognized this feature in its opinion. Admittedly, by number, the persons interested in body building are a minority group. Petitioners interpret this Court's decisions to intend that such a minority group as body builders have a constitutional right to receive their

magazines through the United States mails, regardless of what effect physique magazines might have upon another minority group, such as homosexuals. Even among homosexuals there is a myriad of every day stimuli, which would arouse the prurient interests of said homosexuals, while the same stimuli will have no effect on other homosexuals. No witness is qualified to testify as to what features of each of petitioners' magazines would appeal to the majority of homosexuals, even if the witness knew with certainty the people who purchased petitioners' magazines. Petitioners' magazines, nationally distributed in the same manner as any other major magazine is distributed, sell to over 40,000 purchasers per month. These sales are made through news stands and book stores. Based thereon, who is qualified to say with certainty that 39,000 purchasers of petitioners' magazines are homosexuals and 1,000 are persons having an interest in body building; the converse, petitioners argue, could equally be true.

Conclusion

Petitioners assert to the Court that the magazines in question are not obscene and that the Post Office Department is in error when it asserts that these magazines are obscene as appealing to the prurient interests of the average viewer, a homosexual. These magazines are distributed through the mails to news-stands and bookstores where they are offered to the public for purchase. It is impossible for anyone to establish the sexual habits of the numerous purchasers. It can be as readily assumed that all purchasers of these magazines are persons having an interest in the body building features contained in these magazines. However, even if these magazines were intended for homosexuals, which petitioners do not admit, they would still be constitutionally protected as such. Surely a magazine such as "One, Magazine" which states on its cover that it is beamed at homosexuals, would appeal to the prurient interests of its average viewer, so by comparison, these magazines, if tested by this Court's definition, cannot be held to be obscene. Every magazine of consequence, distributed nationally, uses the same method of distribution employed by the petitioners. If our literature is to be judged by the standards used in the Post Office Department, we are relegated to reading material

which would not appeal to the prurient interest of any particularly susceptible group, including children. Carried to its extreme, this would bar any reading material other than "Mother Goose Rhymes." There are so many different fetishes in existence that any photographic magazine would be subjected to condemnation. This, petitioners argue, the Courts should not allow. Petitioners urge this Court, upon consideration of all of the points raised in this Petition, to grant the writ prayed and to reverse the judgment of the Court below.

Respectfully submitted,

STANLEY M. DIETZ

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[Filed Mar. 23, 1961]

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,072 September Term, 1960.

Manual Enterprises, Inc., et al.,
Appellants,
v.
J. Edward Day,
Postmaster General,
Appellee.

Civil 1450-60

Appeal from the United States District Court for the District of Columbia.

Before: Fahy, Danaher and Bastian, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

Per Circuit Judge Bastian.

Dated Mar. 23, 1961

Circuit Judge Fahy concurs in the result.

DECISION

Dated March 23, 1961

Mr. Stanley M. Dietz for appellants.

Mr. Donald Smith, Assistant United States Attorney with whom **Messrs. Oliver Gasch**, United States Attorney, and **Carl W. Belcher**, Assistant United States Attorney, were on the brief, for appellee. **Mr. Frank Q. Nebeker**, Assistant United States Attorney, also entered an appearance for appellee.

Before FAHY, DANAHER and BASTIAN, Circuit Judges.

BASTIAN, **Circuit Judge**. In April, 1960 postal officials determined that three magazines, "Manual," "Trim," and "Grecian Guild Pictorial," (hereinafter referred to as appellants), were non-mailable under 18 U.S.C. par. 1461 as being obscene and as conveying information as to how and where obscene matter might be obtained. Pursuant to this determination, copies of the magazines were withheld from dispatch. Shortly thereafter an administrative hearing was conducted, in which appellants participated, which ended adversely to appellants. Suit for injunctive relief was then filed in District Court. Appellants' motion for preliminary injunction was denied. On cross-motions for summary judgment, appellants' was denied, and appellee's was granted. This appeal followed.

The magazines in question are physique magazines, composed almost exclusively of photographs of nearly nude male models. Each photograph is accompanied by a brief caption giving the names of the model and photographer. Each issue also contains an index listing the photographers who have contributed to that magazine and a few advertisements from photographers and studios offering collections of nude photographs.

At the administrative hearing psychiatrists testified in great detail, explaining how and why the poses used in most of the pictures and the clothing worn by the models would arouse great prurient interest in homosexuals. Psychiatric testimony was also given to the effect that certain objects (swords and chains) used in some of the pictures were primary symbols of sexual fantasies of deviates within the homosexual group.

A postal inspector testified that, using an assumed name, he submitted orders to some of appellants' advertisers and received from them photographs of nude males with the pubic area exposed to view. He further testified that, in his experience, additional orders would produce photographs progressively more lascivious. Investigations at the studios which mailed the particular photographs here involved resulted in the discovery of what was termed "hard core pornography," photographs of groups of nude males engaged in homosexual activities.

Appellants contend that these magazines are body-building magazines, and that the publishers have no way of knowing whether newsstand sales are made to homosexuals or body-building enthusiasts. They further contend that they can not be charged with the photographs found in the course of the investigations because they were not sent through the mails and that the photographs which were actually sent are not obscene because nudity as such is not obscene.

We think there was substantial evidence on the administrative record to support the conclusion that these magazines were intended for homosexuals. Overlooking the testimony that Herman Womack (the owner of two of the magazines and the publisher of all three) actually admitted such intent, the expert testimony as to the effect of the published pictures on homosexuals coupled with the obvious lack of relationship of the "posing straps," heavy boots, helmets, swords, and chains to any interest in body-building, we think, amply supports the inference that these pictures were deliberately published because of their effect upon homosexuals.

Appellants contend that even if these pictures do arouse prurient interests in homosexuals, they are not obscene within the definition of Roth v. United States, 354 U.S. 476 (1957), the so-called "average person in the community" test. It seems to us that the real meaning of Roth is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. On the basis of the evidence

before the administrative body, we think that "the average member of the community" would be an atypical reader of these magazines. The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. The finding that these magazines were obscene within the meaning of the statute is therefore affirmed.

The testimony of the postal inspector as to his experience in the progressive nature of the material sent through the mails by the advertisers, together with the photographs actually so sent and those seized at the same studios, we think, furnishes substantial evidence for the conclusion that the advertisements in these magazines did give information with respect to where, how and from whom obscene matter could be obtained. The foregoing omits consideration of whether the photographs actually sent through the mails were obscene. A prior decision of this court has held such matter to be obscene. See Womack v. United States, No. 15,749 ___ U.S. App. D.C. ___, ___ F2d ___ (decided Jan. 12, 1961). This finding of the administrative body is likewise affirmed.

The judgment of the District Court is therefore

Affirmed.

FAHY, **Circuit Judge**, **concurs** in the result.

STATUTES

CONSTITUTION OF THE UNITED STATES

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

18 UNITED STATES CODE

§ 1461. Mailing obscene or crime-inciting matter.

Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and —

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing —

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly deposits for mailing or delivery, anything declared by this section to be nonmailable, or

knowingly takes the same from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "indecent", as used in this section includes matter of a character tending to incite arson, murder, or assassination. (June 25, 1948 ch. 645, §1, 62 Stat. 768, eff. Sept. 1, 1948.)

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC., A body corporate; TRIM ENTERPRISES, INC., A body corporate; GRECIAN GUILD, A body corporate, PETITIONERS

v.

J. EDWARD DAY, Postmaster General of the United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Columbia (J.A. 82-83) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 2a-4a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 23, 1961 (Pet. 1a). The petition for a writ

of certiorari was filed on May 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' publications were properly excluded from the mails on the ground that the dominant theme of the publications was an appeal to the prurient interest of homosexuals and that the publications contained information as to where similar obscene matter could be obtained.

2. Whether withholding publications from the mail pursuant to 18 U.S.C. 1461, pending an administrative determination of their mailability, amounts to an unconstitutional prior restraint.

STATUTE INVOLVED

18 U.S.C. 1461 provides in pertinent part:

> § 1461. *Mailing obscene or crime-inciting matter.*
>
> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be pre-

vented or abortion produced, whether sealed or unsealed; and

* * * * *

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

STATEMENT

Petitioners brought this action to compel the Post Office Department to accept for mailing 255 copies of the April 1960 issue of *MANual* magazine, 75 copies of the May 1960 issue of *Trim* magazine, and 75 copies of the May 1960 issue of *Grecian Guild Pictorial* magazine. These items were excluded from the mails after an administrative hearing in which the Judicial Officer of the Post Office Department found that the maga-

zines were nonmailable under 18 U.S.C. 1461, *supra*, pp. 2-3, because they were obscene and conveyed information as to where pornographic photographs could be obtained. The three publications are allegedly physique magazines, but they are composed almost exclusively of photographs of nearly nude male models. Herman L. Womack is the publisher of each magazine.

The relevant facts may be summarized as follows:

On April 5, 1960, the General Counsel of the Post Office Department ruled that the magazines in question were obscene and therefore nonmailable (Pet. 3). Petitioners thereupon filed a complaint for injunctive relief in the District Court for the District of Columbia. That court denied the petitioners' motions for injunctive relief, but remanded the case to the Post Office Department for an administrative adjudication of whether the magazines were nonmailable within the meaning of 18 U.S.C. 1461 (R. Mem. 2).[1]

On April 14, 1960, the General Counsel filed a complaint with the Judicial Officer of the Post Office Department alleging that the magazines should be excluded from the mails because they were obscene and because they contained advertisements as to where obscene materials could be purchased (R. Mem. 3). Beginning on April 21, 1960, adjudicatory hearings were held before the Judicial Officer after the parties had stipulated to waive the rules requiring a hearing before a hearing examiner (R. Mem. 3).

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[1] The record in the Court of Appeals filed in this Court has not been completely paginated. "R. Mem." refers to the Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Defendants' Motion for Summary Judgment, which is a part of the unpaginated record.

Both parties introduced expert witnesses, psychiatrists and psychologists, and the experts agreed that these so-called body building magazines would not appeal to the prurient interests of the average male member of the community (R. Mem. 3-4). However, the government experts concluded that the dominant theme of the publications was an appeal to the prurient interests of homosexuals (J.A. 8, 41, 48, 72-73).[2] They noted that the magazines were almost entirely composed of photographs which had nothing to do with body-building but which displayed the model in such a manner as to stimulate the erotic fantasies of the homosexual[3] (J.A. 4, 7-8, 42, 46-47). Thus, the pictures exhibited the model's buttocks, pubic hair or semi-erect penis (J.A. 4, 5, 16, 17, 22; 6, 7, 19), or they employed fetishistic symbols such as swords and chains (J.A. 5-6, 12, 13). Furthermore, the general structure of the magazine was found by these witnesses to contribute to this arousing effect (J.A. 5, 44-45), and the advertisements for "exciting pictures" were also believed to stimulate the reader to order the photographs so as "to become sexually excited as the picture promises" (J.A. 24, 25). Finally, the government experts concluded that homosexuals probably were the major audience for these publications (J.A. 8; R. Mem. 7).

The testimony of the petitioners' expert witnesses was to the effect that this type of magazine and picture would only have a minimal effect on practicing homo-

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[2] One of the government's expert witnesses testified: "Not only the dominant theme, but the only theme" (J.A. 48).

[3] It was also testified that adolescents and other borderline cases can and have been diverted into homosexual patterns by these types of pictures (J.A. 8-10, 42).

sexuals and perhaps a greater impact on frustrated homosexuals (J.A. 49), and would have no effect on the average male member of the community (J.A. 52-58, 72-73).

Counsel for the Post Office Department also introduced evidence at the hearing that Mr. Womack knew that this type of magazine appealed to and was purchased by homosexuals (J.A. 60, 69-70). It was also shown that Womack was selling photographs of nude male models under the corporate name of Continental Artists, and that Womack stated that he knew that homosexuals would be the audience for this type of picture [4] (J.A. 63). This evidence was not rebutted.

A Post Office inspector also testified that he had submitted orders to some of the advertisers and received from them photographs of nude males. He stated that in his experience additional orders would produce progressively more pornographic portraits (J.A. 63-64; see also R. Mem. 7-10).

On April 28, 1960, the Judicial Officer held that the several issues of petitioners' magazines were nonmailable because their dominant theme was an appeal to the prurient interests of homosexuals, and because they contained advertisements as to where to obtain pornographic materials (Pet. 3, 4).

On May 13, 1960, petitioners instituted this action for an injunction in the district court (Pet. 4-5). After cross-motions for summary judgment were made, the court held that the decision of the Judicial Officer

[4] In connection with the Continental Artists enterprise, Womack was convicted by a jury for mailing information where to obtain obscene matter and for actually mailing obscene photographs. See *Herman L. Womack* v. *United States* C.A.D.C., No. 15749, Jan. 12, 1961, certiorari denied, 365 U.S. 859.

was supported by the evidence and granted respondent's motion for summary judgment (J.A. 82-83).

On appeal, petitioners contended that the publications were not obscene under the test laid down in *Roth* v. *United States*, 354 U.S. 476, because they had no effect on the average male. They also claimed that the magazines could not be excluded on the ground that they contained advertisements as to where obscene matter could be obtained because Womack did not know that the advertisers were dealing in pornography. Finally, the petitioners asserted that the exclusion of the magazines pending the outcome of the adjudicative determination of their mailability amounted to an unconstitutional prior restraint. The Court of Appeals rejected these arguments and held that the publications were obscene because their primary purpose was to appeal to the prurient interests of a particularly susceptibe group. The court said (Pet. App. 3a-4a):

> Appellants contend that even if these pictures do arouse prurient interests in homosexuals, they are not obscene within the definition of *Roth* v. *United States*, 354 U.S. 476 (1957), the so-called "average person in the community" test. It seems to us that the real meaning of *Roth* is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. On the basis of the evidence before the administrative body, we think that "the average member of the community"

would be an atypical reader of these magazines. The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. The finding that the magazines were obscene within the meaning of the statute is therefore affirmed.

ARGUMENT

Both courts below have held that there was ample evidence to support the administrative findings, and have concluded that petitioners' publications were obscene under 18 U.S.C. 1461 and *Roth* v. *United States*, 354 U.S. 476. The concurrent findings of the two lower courts are clearly correct, there is no conflict, and no general issue calling for review on this record is presented.

1. The petitioners claim that these magazines are not obscene within the meaning of *Roth* v. *United States*, 354 U.S. 476, because they do not appeal to the prurient interests of the average member of the community. Petitioners' publications are not, however, intended for "the average person in the community" but are directed at a particular class—homosexuals. Material which might not affect the average person may nevertheless be obscene if it is primarily directed to a particularly susceptible audience, such as the immature, the deviate or the homosexual, for the purposes of satisfying or stimulating a craving for erotic fantasy. *Klaw* v. *Schaffer*, 151 F. Supp. 534 (S.D. N.Y.), affirmed, 251 F. 2d 615 (C.A. 2); *Parmelee* v. *United States*, 113 F.

2d 729 (C.A.D.C.); *United States* v. *Levine*, 83 F. 2d 156 (C.A. 2); A.L.I. Model Penal Code, Tentative Draft No. 6 (1957) § 207.10(2);[5] Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 70-84; Lockhart and McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 340.

To consider the effect of the dominant theme of the material on the special group it is designed and most likely to reach is not at all a return to the rule of *Regina* v. *Hicklin* [1868], L.R. 3 Q.B. 360, *i.e.*, allowing generally disseminated "material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons." See *Roth* v. *United States*, 354 U.S. at 488-489. The nature of the particular group sought to be stimulated is the controlling factor. It cannot be said that magazines which are specifically intended to stimulate the homosexual are not obscene merely because they do not sexually arouse the average member of the community. Such a result would permit the panderers of pornography to exploit the immature and susceptible at will, without furthering the public's right of access to works with the slightest redeeming social importance.[6]

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[5] The Model Penal Code provides in pertinent part: "Obscenity shall be judged with reference to ordinary adults, except that it shall be judged with reference to children or other specially susceptible audience if it appears from the character of the material or the circumstances of its dissemination to be specially designed for or directed to such an audience."

[6] The case of *United States* v. *31 Photographs, etc.*, 156 F. Supp. 350 (S.D. N.Y.), further demonstrates that obscenity cannot be determined without considering the probable audience of the material. In this case, customs officials attempted to prevent the importing

In the present case, the expert testimony and the admissions of the publisher (Womack) conclusively established that homosexuals, or persons with such tendencies, were the primary purchasers of these magazines, that Womack was aware of this, and that the dominant theme—indeed, "not only the dominant theme, but the only theme" (J.A. 48)—of each magazine was an appeal to the prurient interests of the homosexual. A cursory glance at each magazine leads only to the conclusion that they have nothing to do with body building since they contain practically no textual material and very few of the pictures display any body-building exercises or equipment. For recent cases holding comparable pictures obscene, see *Collier* v. *United States*, 283 F. 2d 780 (C.A. 4), certiorari denied, 365 U.S. 833; *Womack* v. *United States*, C.A.D.C., No. 15749, decided Jan. 12, 1961, certiorari denied, 365 U.S. 859.

2. The petitioners cite *Mounce* v. *United States*, 247 F. 2d 148 (C.A. 9), remanded, 355 U.S. 180, *One, Inc.* v. *Olesen*, 241 F. 2d 772 (C.A. 9), reversed, *per curiam*,

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of photographs which were to be used in connection with the Kinsey study of sexual behavior on the ground that the materials would admittedly appeal to the prurient interests of the average man. The court held that the photographs were not obscene because they would not sexually arouse the group who would use the materials (p. 354):

> To whose prurient interest must the work appeal? While the rule is often stated in terms of the appeal of the material to the "average person", Roth v. United States, 1957, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, it must be borne in mind that the cases applying the standard in this manner do so in regard to material which is to be distributed to the public at large. I believe, however, that the more inclusive statement of the definition is that which judges the material by its appeal to "all those whom it is likely to reach", United States v. Levine, 2 Cir., 1936, 83 F. 2d 156, 157.

355 U.S. 371, and *Sunshine Book Company* v. *Summerfield*, 128 F. Supp. 564 (D. D.C.), affirmed, 249 F. 2d 114 C.A. D.C.), reversed, *per curiam*, 355 U.S. 372, for the proposition that a publication which caters to the sexual appetite of a susceptible group is not obscene if it would not affect a normal, healthy individual These cases are inapposite. Unlike petitioners' publications, the dominant theme in these publications was not an appeal to the prurient interest. The magazine *One* dealt with the general problems of the homosexual and only contained two isolated items which could conceivably have been regarded as lewd, while the lower court ruling in *Sunshine* was based on five photographs occupying less than 3% of the magazine, which was devoted to promotion of the general idea of nudism. See, *e.g.*, *Collier* v. *United States*, 283 F. 2d 780, 782 (C.A. 4), certiorari denied, 365 U.S. 833. *Mounce* was remanded upon the government's confession of error on the ground that the trial court had applied the erroneous pre-*Roth* standard of obscenity.

3. Independently of whether the magazines are themselves obscene, they may be barred from the mails under 18 U.S.C. 1461 on the ground that they contain information as to where, how, and from whom obscene materials can be obtained. The petitioners do not dispute the fact that the magazines contain such information. Nevertheless, they argue that the magazines should not be excluded from the mails because the publisher did not know that the advertisers dealt in pornography, citing *Smith* v. *California*, 361 U.S. 147. It would appear, however, that Womack knew that the advertisements contained such information. The Post Office Department had informed him earlier that some

advertisers were distributing pornographic photographs; he knew that the homosexual was the major market for this type of magazine and picture; he was in the same type of business as the advertisers and was himself convicted of sending obscene photographs through the mail. *Womack* v. *United States*, C.A.D.C., No. 15749, decided Jan. 12, 1961, certiorari denied, 365 U.S. 859.

4. The petitioners also contend that the exclusion of these magazines from the mails pending the administrative determination of their mailability constituted an unconstitutional prior restraint. This argument, too, is without merit. It has long been recognized that the Post Office Department has authority to exclude matter from the mails,[7] *Ex parte Jackson*, 96 U.S. 727, 735-36; *In re Rapier*, 143 U.S. 110; *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407; *Monart, Inc.* v. *Christenberry*, 168 F. Supp. 654 (S.D. N.Y.), and that such an exclusion, if proper, does not violate the First Amendment. *Donaldson* v. *Read Magazine*, 333 U.S. 178; *Sunshine Book Company* v. *Summerfield*, 249 F. 2d 114 (C.A. D.C.), reversed on other grounds, 355 U.S. 372; *Klaw* v. *Schaffer*, *supra*. In *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, this Court held that a state statute which temporarily restrained the distribution of a publication pending determination of the issue of obscenity was not an unconstitutional prior restraint. See, also, *Times Film Corp.* v. *Chicago*, 365 U.S. 43.

We doubt that any serious First Amendment issue

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[7] Of course, a hearing must be granted. *Walker* v. *Popenoe*, 149 F. 2d 511 (C.A.D.C.).

can arise out of Congress' clear direction that the Postmaster General should exclude obscene matter from the mail, so long as that mandate is fairly and expeditiously followed, and is subject to judicial review. Obscenity is not protected by the Constitution in state criminal proceedings (*Alberts* v. *California*, 354 U.S. 476), in federal prosecutions for depositing it in the mails (*Roth* v. *United States*, 354 U.S. 476), or in speedy state civil injunction proceedings to restrain its sale (*Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436). It should not be treated differently in federal administrative proceedings conducted with dispatch, as was this proceeding. One who distributes obscenity through the mail should have no greater rights under the First Amendment than one who uses the mails to conduct a fraudulent enterprise. *Donaldson* v. *Read Magazine*, 333 U.S. 178; *Public Clearing House* v. *Coyne*, 194 U.S. 497.[8]

[8] The recent decision in *Marcus* v. *Search Warrants*, No. 225, Oct. Term 1960, decided June 19, 1961, is plainly distinguishable on the grounds, among others, that here there was no mass wholesale search-and-seizure of all materials thought by the seizing officers to be obscene (*i.e.*, a complete restraint on all distribution), but solely the exclusion from the mails (*i.e.*, from only one of the means of distributing magazines) of particular publications, offered by petitioners for mailing, which were preliminarily determined by responsible officials to be obscene.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC.,
A body corporate

TRUTH ENTERPRISES, INC.,
A body corporate

GRECIAN GUILD,
A body corporate

Appellants,

v.

J. EDWARD DAY,
Postmaster General of the United States

Appellee.

BRIEF OF APPELLANT

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Appellants,

v.

J. EDWARD DAY,
Postmaster General of the United States

Appellee.

BRIEF OF APPELLANT

REFERENCE TO THE OPINIONS BELOW

The Order of the United States District Court for the District of Columbia denying motion for preliminary injunction and plaintiffs' motion for summary judgment and granting defendant's motion for summary judgment appears in the Record at page seventy-eight. Judgment of the United States Court of Appeals for the District of Columbia confirming the Order of the United States

District Court for the District of Columbia appears in the Record on page ninety-three and the opinion of that Court appears in the Record at page ninety.

JURISDICTION

The United States District Court for the District of Columbia had jurisdiction over this case. The decision and judgment of the United States Court of Appeals for the District of Columbia was entered March 23, 1961. The jurisdiction of this Honorable Court is invoked under Title 28 U. S. Code Section 1254. This Court granted the Petition for Writ of Certiorari on October 9, 1961.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitution of the United States

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statute Involved

18 U.S.C. 1461 provides, in pertinent part:

18 U.S.C. § 1461. Mailing obscene or crime-inciting matter.

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> • • • •
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and
>
> • • • •
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.
>
> • • • •

QUESTIONS PRESENTED FOR REVIEW

1. Whether the appellants' magazines are obscene within the literal meaning of Title 18, United States Code, Section 1461, and if the appellants' magazines were found to appeal to the prurient interest of homosexuals, whether appellants' magazines would come under the protection of the First Amendment to the Constitution of the United States of America.

2. Whether appellants' magazines are non-mailable as containing advertisements of where, how, from whom, and by what means obscene material may be obtained in violation of Title 18, United States Code, Section 1461.

3. Whether the appellee, through the Post Office Department procedures, exercised an unconstitutional prior restraint upon appellants' magazines in violation of the First and Fifth Amendments to the Constitution of the United States of America.

STATEMENT OF THE CASE

Appellants are the corporate owners of three magazines, "Manual", "Trim" and "Grecian Guild Pictorial". On April 5, 1960 the General Counsel of the Post Office Department, ex parte, determined these three magazines to be obscene and non-mailable and withheld from transit through the mails 255 copies of the April, 1960 issue of "Manual," 75 copies of the May, 1960 issue of "Trim" and 75 copies of the May, 1960 issue of "Grecian Guild Pictorial." These magazines were held by the Postmaster in Alexandria, Virginia. Thereafter, appellants forced the Post Office to hold a formal hearing on the question of whether or not these magazines were mailable by obtaining a Temporary Restraining Order from the United States District Court for the District of Columbia. The General Counsel for the Post Office Department on April 14, 1960 filed a complaint with the Judicial Office of the

Post Office Department alleging that the three magazines were obscene and non-mailable and also that the magazines contained advertisements where, how, and from whom obscene matter may be obtained and therefore were non-mailable. To expedite the administrative procedures, appellants stipulated to waive the hearing before a Post Office Department Hearing Examiner and consented to the Post Office Department Judicial Officer presiding at the hearing. The hearing was held at the Post Office Department April 21, 1960 through April 25, 1960. The Post Office Department Judicial Officer agreed with the General Counsel of the Post Office Department and held the several issues of the appellants' magazines to be obscene and non-mailable and further to be non-mailable as containing advertisements as to where, how, and from whom obscene materials could be obtained, all in violation of Title 18 U. S. C. Section 1461. At the Post Office Department hearing both parties produced psychiatrists and psychologists, all of whom agreed that appellants' magazines would not appeal to the prurient interest of the average members of the community, (Record, pages forty-two, forty-three, forty-seven, and forty-eight). No witness was qualified as an expert on body building, physical therapy or physical culture and all admitted ignorance of these matters, (Record, pages twenty-five, twenty-eight, forty-three, forty-four), except Dr. Link, (Record, pages forty-eight, fifty-two, fifty-three). The Post Office Department psychiatrist testified that different photographs in each of appellants' magazines, along with a myriad of other every day stimuli, could appeal to the prurient interest of different types of homosexuals, (Record, pages twenty-one through twenty-three). He also admitted that the photographs in appellants' magazines were less revealing than the totally nude photographs which appear in several issues of "Sunshine and Health" nudist magazines, and other magazines as "Playboy", (Record, pages twenty-three, twenty-four, twenty-eight).

The Post Office Department attempted to prove that appellants' publisher had made statements that the three magazines at issue were sold to homosexuals. Further, the Post Office Department attempted to prove to its Post Office Department Judicial Officer that some of the photographers contributing to appellants' magazines advertised where, how, and from whom obscene matter could be obtained. This was accomplished by introducing obscene photographs seized from the homes and offices of the different photographers, but not obscene photographs which were sold through the mails by the different photographers. The Postal Inspector testified that he had difficulty in purchasing any obscene photographs from any photographer listed in appellants' magazines when responding to an advertisement from appellants' magazines, (Record, page fifty-seven). He further testified that appellants' publisher had offered to delete the works of any contributing photographer to appellants' magazines upon being notified by the Postal Inspector that said photographer had been convicted of any criminal offense, (Record pages fifty-eight thru sixty-two). There was no direct testimony concerning the method of distribution of appellants' magazines, (Record, page sixty-three). The Post Office Department Judicial Officer was unconcerned with what materials would constitute the contemporary community standards in the magazine field and would not permit examination of the psychiatrists as to the effect of other magazines, generally accepted in the community and comparable to appellants' magazines at issue, upon other sexual deviates and particularly susceptible groups of readers, (Record, pages twenty-eight, thirty, thirty-one). On April 28, 1960 the Post Office Department Judicial Officer rendered his Departmental Decision, (Record, page seventy-nine), holding appellants' magazines to be non-mailable and on May 13, 1960 appellants filed their Complaint and Motion for Preliminary Injunction in the United States District

Court for the District of Columbia, (Record, pages sixty-six through seventy-one), which resulted in that Court's Order, (Record page seventy-eight), granting summary judgment to the respondent on August 17, 1960 from which an appeal was taken, (Record, page seventy-nine).

The United States Court of Appeals for the District of Columbia Circuit on March 23, 1961 entered its decision and opinion, (Record pages ninety thru ninety-three), affirming the action of the United States District Court for the District of Columbia Circuit.

Thereafter appellants' petitioned this Court to grant a Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia.

SUMMARY OF ARGUMENT

Appellants' magazine were judged obscene upon the Government's psychiatric testimony. Factually, appellants' magazines were not considered as a whole and were not judged according to the tests set down by this Court in its definition of obscenity in the case of *Roth* v. *United States*, 354 U.S. 476. The Post Office Department adopted its own definition of obscenity, which definition is inherently vague and indefinite. The Post Office Department erroneously uses the term "homosexual" to describe a class of people when the term "homosexual" actually describes activities, and psychic reactions, rather than persons and there could be no magazine appealing to the prurient interests of "homosexuals". Assuming, *arguendo*, that the Post Office Department's definition of obscenity is valid, then appellants' magazines are to be considered as pin-up photographs for "homosexuals" and, as such, appellants' magazines are still constitutionally protected. Appellants magazines are physique magazines, intended to stimulate physical culture, a desirable purpose, and as such, are constitutionally protected.

Appellants' magazines did not give information, where, how, from whom, and by what means obscene material may be obtained, and if obscene materials could be obtained from the contributing photographers and and advertisers in appellants' magazines, then appellant had no knowledge of this situation and took all reasonable measures to avoid giving information where, how, from whom, and by what means, obscene material may be obtained. Appellants' magazines are not obscene and are suitable for transit through the mail.

A magazine publisher, without knowledge of the unknown actions of the contributing photographers and advertisers in the publisher's magazine cannot be held responsible for said actions of the contributing photogarphers and advertisers when all reasonable means of ascertaining the nature of the advertisers' products have been exhausted.

The administrative procedures adopted and practiced by the Post Office Department constitute an unlawful prior restraint. Their effect is to censor from transit through the United States Mails any dated magazine which might be considered distasteful to the Post Office Department.

ARGUMENT

POINT ONE

Whether the Appellants' Magazines Are Obscene Within the Literal Meaning of Title 18, Section 1461, United States, Code, And If The Appellants' Magazines Were Found To Appeal To The Prurient Interest Of Homosexuals, Whether Appellants' Magazines Would Come Under The Protection Of The First Amendment To The Constitution Of The United States Of America

So far as issues Number One and Two are concerned, the statutory and constitutional questions coalesce. This Court in *Roth* v. *United States,* 354 U.S. 476, sustained

pertinent Code Section 18 U. S. Code 1461, prior to its Amendment, on the ground that obscenity lies outside the protection of the constitutional guarantees of the First Amendment. The Court, in that case, thoroughly defined "obscenity." The ambit of the statute, then, cannot constitutionally be broader than the Court's definition of obscenity. Of course, the statute is to be interpreted as broadly as the Constitution allows. In the administrative hearing before the Post Office Judicial Officer, it was allegedly the magazines on trial. The affidavit of Herman L. Womack (Record P. 71), in support of the motion for temporary injunction herein, must be considered in relation to the transcript of the proceedings held at the Post Office (Record page sixty-three). In the *Roth* case, the Court defined obscenity in terms of what it is, and in terms of what it is not. The expression of ideas that have the "slightest redeeming social importance" was held by this Court to be constitutionally protected. To be obscene, therefore, these magazines must be empty of any ideas of even the slightest redeeming social importance. This Court must conclude that physique magazines, also popularly termed body building magazines, have significant social importance to a large segment of the population of the United States.

Further, this Court in defining obscenity, carefully laid down its mandate that the questioned material must be considered as a whole. We have four magazines in evidence. The relevant testimony as to each magazine is hereinafter analyzed:

A—*Analysis of the Exhibits Tested by the Standards Set Forth by this Court in the Definition of Obscenity*

Exhibit I, April 1960 Issue of Manual Magazine
(Admitted in evidence, Record page four)

The Post Office expert witness, Dr. Frank Caprio, in his entire testimony relating to this Exhibit, referred to photographs appearing on 16 pages of this Magazine,

which consists of a total of 48 pages, mathematically one-third of the entire text. His testimony regarding the photographs on pages 2 and 3 and 8 and 9 of Exhibit I, appears in the record on page six. Apparently, the doctor has no quarrel with the photographs apearing on pages 8 and 9 of the magazine whereas his objection to the photographs on pages 2 and 3 is based upon the model's appearing in a posing strap and the depiction of small amounts of pubic hair on the model. The doctor, in his analysis of these photographs gave no consideration to the overall physical development of the model or to any other features of the photographs. Again, the doctor in referring to the photograph on page 12 of Exhibit I gives absolutely no consideration to the physical development of the model (Record, page six). The doctor's testimony that such a photograph would have a special appeal to a homosexual because of the nudity of the model is incredible, since the photograph does not in any way expose any genital area of the model, and is absolutely lacking in sexually stimulating features. In the doctor's consideration of the photographs appearing on pages 18 and 19 of Exhibit I (Record page six), the complaint of the witness was that the genitals were not exposed, without any consideration to the physical development of the models depicted or consideration of the many other features of the photographs taken as a whole. The photographs appearing on pages 18 and 19 of Exhibit I are comparable and similar to a myriad of photographs appearing in other magazines wherein a prop or object is used to cover the genital region, and the particular type of prop or object used to cover the genital region must vary, else all of the photographs would be identical and uniform without allowance for artistic ingenuity of the photographer. Upon an unprejudiced viewing of pages 18 and 19 of Exhibit I, without a preconceived opinion, the viewer must conclude that both photographs depict extremely well-developed models with enviable physiques.

Is that not one of the purposes of a body-builders' magazine—to depict the physique an under-developed viewer would desire to attain?

Referring to Exhibit I, the photographs appearing on pages 20, 22, and 23 (Record, pages six, seven), the witness again complains of the use of posing straps to cover the genital area and, as to page 23, to the model's wearing boots. There again, the witness gave no consideration to the excellent physical development of the models depicted on pages 20, 22, and 23, nor did the witness consider the photographs as a whole. Certainly, any unbiased viewer of these pages 20, 22, and 23 of Exhibit I, must conclude that the dominant theme of the photographs considered as a whole, is a depiction of extremely well developed models, whose physical development, without an ounce of excess flesh, would be, to an average person, enviable.

Referring to the centerfold photograph, pages 24, and 25 of Exhibit I, (Record page seven), the witness, in considering the photograph only took notice of the buttocks of the model. Certainly, an unbiased viewer of the centerfold pages, considering the photographs as a whole, must come to the conclusion that the dominant theme of that photograph is the tremendous muscle development of the model's arms, shoulders and back and the artistic portrayal by the photographer of the model ripping asunder a black wall. Further, in consideration of the lighting used by the photographer, the buttock area is de-emphasized by shadows, whereas the shoulder area is high-lighted Referring to the photographs appearing on pages 30 and 31 of Exhibit I, (Record page eight), the witness again gives no consideration to the physical development of the model depicted, makes no consideration of the photographs as a whole, and simply describes same as "suggestive." In what other manner could a photographer pose his model to so clearly outline the muscular development of the model's legs? Are not the photographs

appearing on pages 30 and 31 of Exhibit I, ideal for use of an artist concerned with figure drawing? Referring to page 35 of Exhibit I, the witness's complaint again is directed towards the type of prop used to cover the genital area without any consideration for any of the other features of the photograph considered as a whole, and completely disregarding the physical, muscular development of the model depicted. (Record page eight). Again, referring to page 36 of Exhibit I, (Record page, eight) depicting an extremely well developed model sunbathing, the witness gives no consideration to the muscular development of the model whose biceps muscles of the arms and legs are the predominant theme of the photograph, with the buttocsk to which the witness adverts, being almost totally obscured by shadow. Again referring to the use of posing strap, (Record pages eight, nine), on page 39 of Exhibit I, the witness gave no consideration to the tremendous physical development of the model. The muscular development of the model's arms, chest and stomach, as accentuated by the poses of the model, certainly would be the dominant theme of the photographs, to an unbiased viewer. There is no necessity that all exercises be performed inside the confines of stuffy gymnasiums and the witness's comments on the shrubbery background of the photographs are nothing less than ridiculous.

Referring to the three advertisements on page 45 of Exhibit I, (Record page nine), the witness again completely overlooks the muscular development of the models depicted.

The Post Office expert witness in psychiatry who is not qualified in any field relating to physical development or body building, (Record pages twenty-five, twenty-eight), at no time in any of his testimony gave consideration to the textual material as it appears in Exhibit I.

Exhibit II, May 1960 Issue of Trim Magazine

(Admitted in evidence, Record page four)

The Post Office expert witness, Dr. Frank Caprio in his entire testimony relating to this Exhibit referred to six pages out of forty eight, or mathematically one-eighth of the total context of the magazine. In commenting upon photographs appearing on pages 18 and 19 of this Exhibit, (Record page twelve), he considered the same as depicting a strip tease. An examination of page 19 shows an extremely well developed model holding a prop to cover the genital region. Certainly, the dominant theme of this photograph considered as a whole, with highlights and shadows, is to the model's chest and shoulders and away from any other region. In commenting upon the photographs appearing on pages 34 and 35 of this Exhibit (Record page twelve), the witness's objection goes to the use of chains, in these two classic dynamic tension poses of models with extremely well developed physiques. The poses of the model on pages 34 and 35 are comparable to the illustrations of Charles Atlas, which appeared in magazines all over the world for many years. The witness, in his entire testimony, gave no consideration to the excellent physical development and body building features depicted in all of the other photographs in this magazine.

Exhibit III, May 1960 Issue of Grecian Guild Pictorial

(Admitted in evidence, Record page four)

The Post Office expert witness, Dr. Frank Caprio, in his entire testimony relating to this exhibit, referred to five pages out of forty eight, or mathematically less than one-eighth of the total context of the magazine. Referring to pages 8 and 9 of this exhibit, (Record pages fourteen, fifteen), the witness emphasized the use of a sword and a chain as a prop. These photographs were illustrating the article "Prometheus" (Exhibit III, page 8) of which

the witness confessed complete ignorance, (Record page thirty-two). Referring to the photograph on page 14 of this Exhibit, (Record page fifteen), the witness testified that the glass held in the model's hand was analogous to the power symbol of a gladiator. A consideration of this photograph taken as a whole, would indicate the model depicting an athlete resting while reading a book containing pictures of nude females, a subject which could not be more distasteful to a male homosexual, and again the witness gave no consideration to the physical development of the model. In referring to the legend of the magazine as it appears at the top of page 2 of Exhibit III, (Record page sixteen), the doctor concludes that the mere use of the name "Grecian Guild Pictorial" brands this Exhibit III as a magazine for homosexuals. In all of the witness's testimony no consideration is given to the textual material contained in this magazine.

Exhibit IV, March 1960 Issue of Trim Magazine

(Admitted in evidence, Record page four)

The Post Office expert witness Dr. Frank Caprio, in his entire testimony relating to this Exhibit referred to four pages out of forty eight, or mathematically, one-twelfth of the total context of the magazine. Referring to page 30 of this Exhibit, (Record page seventeen), the witness's testimony was that the model's genital area was emphasized. Considering this photograph as a whole in conjunction with the photographs of the same model appearing on the preceding two pages, 28 and 29, this is a ridiculous assumption. In the testimony given by this witness relative to the other Exhibits, the chief complaint was in the use of posing straps as against preferred photographs of models wearing short pants or trunks. This series of photographs depicts four views of the model in short pants, which the Post Office Department attempts to label as pornographic. The dominant theme of the photograph on page 30 is not the model's pants

but it is rather clear cut to an impartial viewer, a photograph of a hunter with bow and arrows resting in a tree fork. Again, referring to the photographs on pages 32 and 33, (Record page eighteen), the witness's objection is to the use of the internationally famous bikini bathing suit, without any consideration being given to any of the other features of the photographs. It is immediately apparent that no kind of covering of the model's genital area would satisfy the Post Office Department. Again, referring to page 39 of this Exhibit, (Record page eighteen), the witness's complaint refers to the model's wearing of a short bathing suit as compared with the models appearing on page 38, wearing dungarees or levis, incorrectly described as tight sailor's trunk pants by the witness. Yet the same witness admitted, (Record page twenty-three), that none of the photographs in any of the Exhibits depict a model wherein the male sex organ is apparent. And again, the witness gives no consideration to the physical development of any of the models whose photographs appear in this Exhibit.

In summarizing all of the exhibits only one conclusion may be reached and it is that each of the magazines is a physique magazine as recognized by the United States Court of Appeals for the District of Columbia in its opinion, (Record page ninety), comparable to every other physique magazine sold in the United States, (Record pages twenty-eight, twenty-nine).

B—*The Post Office Department's Definition of Obscenity Is Inherently Vague and Indefinite*

This brings us to an analysis of the Post Office Department's interpretation of this Court's ruling, and definition of obscenity, as set forth in the case of *Roth* v. *United States*, 354 US 476. Exactly what is this so-called homosexual audience composed of? Is the word "homosexual" synonymous with the term "sexual psychopath"? There is no basis for the assumption that all homosexuals are

psycho-biologically predisposed to commit prohibited sexual acts with other males or that they thus necessarily are sex perverts. There would be no more basis to assume that every so-called hetero-sexual male is predisposed by his psycho-biological make-up to commit rape. The *Official Report of the Departmental Committee on Homosexual Offenses and Prostitution, United Kingdom, Home Office and Scottish Home Department, 1957*, states at page 12:

> "It must not be thought that the existence of the homosexual propensity necessarily leads to homosexual behavior of an overtly sexual kind. Even where it does this behavior does not necessarily amount to a homosexual offence; for instance, solitary masturbation with homosexual fantasies is probably the most common homosexual act."

The term "homosexual" as used to describe a class of people is, of course, a misnomer and has no real or useful significance. This use of the word is really the product of popular misapprehension and prejudice. There is, in truth, no definitely definable and distinct group of human beings classifiable as "homosexuals" set apart from the rest of the population, nor is the word "hetero-sexual" a proper description of a class of people. The two expressions describe activities and psychic reactions, rather than persons. It must be understood that "homosexual" is not a characteristic of a small, isolated, group of people, but is a type of sexual activity or propensity which directly affects and occurs in the lives of vast proportions of our population. Professor Kinsey in his "*Sexual Behavior In The Human Male*" and "*Sexual Behavior In the Human Female*" makes the following observations:

> ". . . there is only about half of the male population whose sexual behavior is exclusively heterosexual, and there are only a few percent who are exclusively homosexual. Any restriction of the term homosexuality to individuals who are exclusively so demands,

logically, that the term heterosexual be applied only to those individuals who are exclusively heterosexual; and this makes no allowance for the nearly half of the population which has had sexual contacts with, or reacted psychically to, individuals of their own as well as of the opposite sex. Actually, of course, one must learn to recognize every combination of heterosexuality and homosexuality in the histories of various individuals."

"*Sexual Behavior in the Human Male*", pp. 616-617.

"There are some persons whose sexual reactions and socio-sexual activities are directed only toward individuals of their own sex. There are others whose psychosexual reactions and socio-sexual activities are directed, throughout their lives, only toward individuals of the opposite sex. These are the extreme patterns which are labeled homosexuality and heterosexuality. There remain, however, among both females and males, a considerable number of persons who include both homosexual and heterosexual responses and/or activities in their histories. Sometimes their homosexual and heterosexual responses and contacts occur at different periods in their lives; sometimes they occur coincidentally. This group of persons is identified in the literature as bisexual.

"That there are individuals who react psychologically to both females and males, and who have overt sexual relations with both females and males in the course of their lives, or in any single period of their lives, is a fact of which many persons are unaware; and many of those who are academically aware of it still fail to comprehend the realities of the situation. It is a characteristic of the human mind that it tries to dichotomize in its classification of phenomena. Things either are so, or they are not so. Sexual behavior is either normal or abnormal, socially acceptable or unacceptable, heterosexual or homosexual; and many persons do not want to believe that there are gradations in these matters from one to the other extreme."

"*Sexual Behavior in the Human Female*", pp. 468-469.

It is, therefore, a problem, even in the medical profession, to define a person as a homosexual, rather than defining an activity as homosexual. There are individuals who carry out homosexual acts who psychologically are not homosexuals. That is the individual who might do this act for money, with no desire whatsoever of a sexual nature to commit the act. In that sense, psychologically, he is not homosexual. If, in defining the term homosexual, there would be included any individual who has some latent homosexual tendencies within him, then, all persons would be classified homosexuals, since all persons have to some degree latent homosexual tendencies within them. If, in defining the term "homosexual" it would be limited to individuals who have actually carried out overt homosexual acts, then the term would be synonymous with "sexual psychopath".

In "*Problems Of Homosexuality*" at pp. 3 and 4, Dr. Norman Reider makes the following comments:

> "Whom shall we consider the homosexual? Shall we consider all of the thirty-seven percent of males who have had at least one homosexual contact? Shall we consider only four percent whose sexual outlets are only through homosexual activity? If we adopt a definition which contains some extraction of this one extreme or the other we lose sight of the fact that there is a gradation of sexual activity, interest and preoccupation which flows from one extreme to the other. We would be losing sight of the fact that there is a historical and developmental approach to the problem which tends to show that each of us has both biological and psychological roots for homosexuality. The biological roots are clear, that there is a phase in our ontogenetic development in which we are the objects of tenderness, affection, abuse, and cruelty at the hands of both men and women. Our destinies are shaped out of so many factors which

> come out of our past histories that to try to make the problem of homosexuality from an etiological point of view a simple one, is just not facing the facts. There are those who would like to say that it is simply a matter of constitution and biochemistry. Unfortunately, our knowledge to this point fails to show what the essential difference is in either the constitution or the biochemistry between the homosexual and the heterosexual. A much greater accumulation of evidence stands to show that environmental and developmental factors do more to shape the avenue in which we will seek our sexual outlets than anything constitutional. But at the same time I can very easily say that those who are doing research in this field have only begun to unravel the mysteries involved."

Therefore, an individual should be considered homosexual only if he indulges exclusively in these practices. The existence and extent of latent homosexuality exists in all persons because of their bi-sexual constitution.

Professor Kinsey also distinguished between overt homosexual experiences, involving orgasm, and psychic reactions, which do not involve physical contact (see *Report on the Male*, p. 623). The results of his studies in this connection are stated in his "*Report on the Male*", pp. 638-655, as follows:

> "The histories which have been available in the present study make it apparent that the heterosexuality or homosexuality of many individuals is not an all-or-none proposition. It is true that there are persons in the population whose histories are exclusively heterosexual, both in regard to their overt experience and in regard to their psychic reactions. And there are individuals in the population whose histories are exclusively homosexual, both in experience and in psychic reactions. But the record also shows that there is a considerable portion of the population whose members have combined, within their individual histories, both homosexual and heterosexual experience and/or psychic responses. There are some whose

heterosexual experiences predominate, there are some whose homosexual experiences predominate, there are some who have had quite equal amounts of both types of experiences.

"Some of the males who are involved in one type of relation at one period in their lives, may have only the other type of relation at some later period. There may be considerable fluctuation of patterns from time to time. Some males may be involved in both heterosexual and homosexual activities within the same period of time.

"Males do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats . . . The sooner we learn this concerning human sexual behavior the sooner we shall reach a sound understanding of the realities of sex.

"While emphasizing the continuity of the gradations between exclusively heterosexual and exclusively homosexual histories, it has seemed desirable to develop some sort of classification which could be based on the relative amounts of heterosexual and of homosexual experience or response in each history." (pp. 638-639).

For this purpose, Professor Kinsey devised a "heterosexual-homosexual rating scale" on which

"Based on both psychologic reactions and overt experience, individuals rate as follows:

"0. Exclusively heterosexual with no homosexual.

1. Predominantly heterosexual, only incidentally homosexual.
2. Predominantly heterosexual, but more than incidentally homosexual.
3. Equally heterosexual and homosexual.
4. Predominantly homosexual, but more than incidentally heterosexual.
5. Predominantly homosexual, but incidentally heterosexual.

6. Exclusively homosexual." (p. 638)

"It will be observed that the rating which an individual receives has a dual basis. It takes into account his overt sexual experience and or his psychosexual reactions." (p. 647).

Professor Kinsey presents us with the following statistics in his "*Report On The Male*":

"37 percent of the total male population has at least some overt homosexual experience to the point of orgasm between adolescence and old age (Figure 156).

This accounts for nearly 2 males out of every 5 that one may meet.

"50 percent of the males who remain single until age 35 have had overt homosexual experience to the point of orgasm, since the onset of adolescence (Figure 156)." (pp. 647-650).

"13 percent of the males (approximately) react erotically to other males without having overt homosexual contacts after the onset of adolescence.

"30 percent of all males have at least incidental homosexual experience or reactions (i.e., rate 1 to 6) over at least a three-year period between the ages of 16 and 55. This accounts for one male out of every three in the population who is past the early years of adolescence (Table 150, Figure 168).

"25 percent of the male population has more than incidental homosexual experience or reactions (i.e., rates 2-6) for at least three years between the ages of 16 and 55. In terms of averages, one male out of approximately every four has had or will have such distinct and continued homosexual experience.

"18 percent of the males have at least as much of the homosexual as the heterosexual in their histories (i.e., rate 3-6) for at least three years between the ages of 16 and 55. This is more than one in six of the white male population." (p. 650).

Professor Kinsey concludes in his "*Report On The Male*" at p. 659:

> "In view of the data which we now have on the incidence and frequency of the homosexual, and in particular on its co-existence with the heterosexual in the lives of a considerable portion of the male population, it is difficult to maintain the view that psychosexual reactions between individuals of the same sex are rare and therefore abnormal or unnatural, or that they constitute within themselves evidence of neuroses or even psychoses."

Dr. Carl M. Bowman, and Bernice Engle in "*The Problem of Homosexuality*" at p. 9, state that "The large group of homosexuals contains many men of a particularly virile, masculine type, a number of whom go in for active sports and become noted athletes." Therefore, the term "homosexual" cannot be properly and validly identified except possibly by evidence of performance of a sexual act with a person of the same sex, and then only after determining with definiteness what motivated the sexual act since the majority of those who are actually caught in or who indulge in homosexual acts are actually bi-sexual.

According to the Post Office Department this large segment of our society as defined above by Professor Kinsey, in his "*Report On The Male*" would thereby be unconstitutionally reduced to second class citizenship. The Post Office Department would stamp any purchaser of our magazines as homosexuals. They would be discriminated against and prohibited from obtaining a magazine of their choice merely because of their personal characteristics which presumably set them apart, and not because they are guilty of any crime. Even if, assuming *arguendo*, that the Post Office Department was correct in this assumption, persons with homosexual inclinations are not *ipso facto*, criminals or detrimental to civilization, nor are they necessarily afflicted by disease, nor do they com-

prise a small proportion of the population which can be isolated and contained, nor is homosexuality as such intrinsically evil. Our Constitution does not state that only heterosexuals may receive and read the literature of their choice and homosexuals must read the same literature or be denied the right to view a magazine which interests them. To interpret our Constitution and this Court's definition of obscenity, in the manner that the Post Office Department has done, reduces a large segment of our society to second class citizenship. The Post Office Department's attempt to wipe out our magazines could not possibly end homosexuality. Dr. Blanche M. Baker in her introduction to Helen P. Branson's book *"Gay Bar"* states at p. 10: "Of one thing we can be sure: Like sex, homosexuality is here to stay. No amount of condemnation, criticism, entrapment or incarceration in penal and mental institutions can wipe out the fact of the existence of this tremendously large minority. There is so much secrecy connected with it that it is almost impossible to estimate the incidence of homosexuality."

This action of the Post Office Department represents nothing more than an attempt to enforce the prejudices of the predominant social and economic majority over a minority group in our population. The Post Office Department would set up dual standards in literature; what is acceptable to the prejudiced censors and what is unacceptable.

Homosexuality, as stated by Professor Kinsey, in his *"Report On the Male,"* p. 659:

> "In view of the data which we now have on the incidence and frequency of the homosexual, and in particular, on its co-existence with the heterosexual in the lives of a considerable portion of the male population, it is difficult to maintain the view that psychosexual reactions between individuals of the same sex are rare and therefore abnormal, or unnatural, or that they constitute within themselves evidence of neuroses or even psychoses."

And at page 666:

> "If all persons with any trace of homosexual history, or those who were predominantly homosexual were eliminated from the population today, there is no reason for believing that the incidence of the homosexual in the next generation would be materially reduced. The homosexual has been a significant part of human sexual activity ever since the dawn of history. Primarily because it is an expression of capacities that are basic in the human animal."

Homosexuality is not a disease, and it does not endanger the health of society. In the "*Report of the Departmental Committee on Homosexual Offenses and Prostitution*," United Kingdom Home Office and Scottish Home Department, 1957, we find at page 14:

> "On the criterion of symptoms, however, homosexuality cannot legitimately be regarded as a disease, because in many cases it is the only symptom and is compatible with full mental health in other respects. In some cases, associated psychiatric abnormalities do occur, and it seems to us that if, as has been suggested, they occur with greater frequency in the homosexual, this may be because they are products of the strain and conflict brought about by the homosexual condition and not because they are causal factors. It has been suggested to us that associated psychiatric abnormalities are less prominent, or even absent, in countries where the homosexual is regarded with more tolerance."

The British Report, at pp. 21-22, rejects the notion that homosexuality endangers the health of society. At p. 73, the Report recognizes the incidence of "Homosexuality in relatively intact personalities, otherwise well socialized. Many of these are valuable and efficient members of the community, quite unlike the common conception of the homosexual as being necessarily, or probably, vicious, criminal, effete or depraved."

Dr. Blanche M. Baker in her introduction to Helen P. Branson's book, "*Gay Bar*", at pp. 8 and 9, states:

> "I do not consider homosexuality to be a disease. Like Dr. Alfred Kiasey, I regard it as one of our mammalian heritages, of complex origins, so widespread in the animal kingdom that no serious student could consider it to be unnatural but merely a variation of commonly accepted sexual behavior. Any human being who suffers from pain, rejection by his fellows, overly strict authoritarian control, neglect or over-indulgence, may develop neurotic or even psychotic conditions and need psychiatric help. Homosexuals are no exception. Even the best natured dog, if kicked around enough, may snarl and bite back. I regard objectionable mannerisms and social conduct of 'queers' as neurotic expressions of their inward fears and hostilities and not due to their homosexuality per se. The rapidity with which such traits disappear in group therapy under the skilled guidance of trained non-critical leaders verifies this."

In the Post Office Department's interpretation of this Court's definition of obscenity, reason has given way to an illogical approach, characterized by blind prejudice, superstition, hatred and condemnation of non-conformity, and an illogical attempt to equate mores, morals and law. The Post Office Department would suppress such as Plato, Michelangelo, Leonardo da Vinci, all overt homosexuals. The Post Office Department expert witness condemns Exhibit III, the May 1960 issue of "Grecian Guild Pictorial" as an obscene magazine, aimed at homosexuals because of its title, "*Grecian Guild Pictorial*". All historians recognize that among the ancient Greeks homosexuality was an accepted outlet of the sexual drive of both men and women. No historian would assert that the strength of the Greek race nor the standards of its culture suffered thereby. Rather, the Greeks established a Golden Age of art and literature which successive generations have tried to emulate, but not the Greeks frank approach to sex. There is no evidence in history to support the premise that a nation will degenerate and decay unless homosexuality is stamped out of existence, which constitutes the

Post Office Department's great crusade. Summarizing this analysis of the Post Office Department's interpretation of this Court's definition of obscenity as set forth in the case of *Roth* v. *United States*, 354 US 476, we assert that the Post Office Department is unconstitutionally attempting to discriminate against and censor the literature of a minority group and that inherently the Post Office Department's definition of obscenity is too vague and indefinite to be constitutional. Carried to its extreme the Post Office Department's ban of our magazines is analogous to a puppy dog chasing his own tail; the magazines are obscene because they are purchased by homosexuals and who are homosexuals, the purchasers of the magazines.

C—*Application of this Court's Definition of Obscenity*

Appellants argue that these magazines must be judged according to their effects upon normal, healthy adults having applied contemporary community standards. The Post Office Department does not allow for a dissent in matters of taste. Petitioners' magazines are constitutionally protected even if they could be considered as hateful to the prevailing climate of public opinion; the case of *Roth* v. *United States*, 354 US 476, held that they would still have the constitutional protection of the First Amendment. This Court's negation of the archaic rule of *Regina* v. *Hicklin*, L.R. 3, QB 360, surely does not mean that a Gallup Poll must be conducted to determine the sexual habits of some 40,000 monthly purchasers of our magazines from newsstands all over the United States, nor may we consider the possible effect upon children or emotionally disturbed readers, illiterates, or particularly susceptible groups. If these magazines would not appeal to the prurient interest of an average, normal, adult they are not obscene and are constitutionally protected. Photographs portrayed in these magazines are, not better, and no worse than those portrayed in such leading magazines

as *Esquire*, *Gentry*, *Rogue*, *Duke*, and *Playboy* magazines which the Post Office would not dare to argue are obscene. A salacious reader who might purchase one of appellants' magazines from a book store is more likely to feel cheated than excited, compared with the numerous nudist magazines, such as *Sunshine and Health*, *Sun Life*, *Helios*, all containing photographic illustrations of entirely nude models with completely exposed genital area, and all of which are displayed for sale at the same newsstands carrying our magazines for sale. But the effect of these magazines on such erotic or abnormal readers does not set the constitutional limit on freedom of speech and press. At the hearing before the Post Office Department Judicial Officer, counsel for the Post Office Department urged that the intent of the publisher should control. Actually, the intent of the publisher is irrelevant herein, because it is the magazines themselves which the Court must base its decision upon, surrounding circumstances being irrelevant.

The Post Office Department attempted to prejudice our magazines as depraving children. This is refuted, (Record, pages forty-one and forty-three). If the publisher of appellants' magazines intended to corrupt the entire juvenile population of the United States by distributing to our younger set magazines containing photographic illustrations of "Mother Goose Rhymes" which the publisher might be of the opinion would appeal to the prurient interests of the Nation's children, the juvenile population of the United States still could not be corrupted since they would still only be receiving "Mother Goose Rhymes".

If all of appellant's magazines were so intended to be beamed at a homosexual audience, appellants' magazines could not be viewed as anything stronger than magazines containing male pin-up photographs (Record page forty-two). This Court surely will take judicial knowledge of the vast number of female pin-up photographs sold an-

nually in the United States, depicting completely nude female models with the genital area exposed. If this Court should cast aside appelants' argument that our magazines are physique, body building magazines, and hold our magazines are nothing more than magazines of male pin-up photographs intended for, and only purchased by homosexuals, then appellants argue to this Court that a homosexual purchaser of appellants' magazines, who pays his income taxes, and does not violate the laws of his Community, State and Nation, is not a second class citizen, and is entitled under our Constitution to purchase his own choice of pin-up photograph. It is quite possible that some photographs contained in appellants' magazines, might appeal to the erotic interest of a possible homosexual purchaser of the magazines, but this is quite different from appealing to a prurient interest of that same purchaser. This is analogous to a so-called heterosexual male person purchasing a nude pin-up photograph of Marilyn Monroe, hundreds of thousands of which appear upon walls all over the United States, which might possibly appeal to the erotic interest of the purchaser, and which is entirely different from the purchase of so-called hard core pornography, or a photograph depicting a model or models in a sexual act, which might possibly appeal to the prurient interest of the purchaser.

There are hundreds of thousands of people in the United States interested in physical development and body building. The huge success of the York Bar Bell Company testifies to this fact. Within our own City of Washington, D. C., there are as many persons attending Vic Tanney's Gymnasiums as attend Arthur Murray's Dance Studios. The President of the United States has selected Oklahoma University Athletic Director Bud Wilkinson to be Director of Physical Fitness for our Youth Corps. Physical development and body building have been popular in the United States for many years and magazines comparable to our magazines have been sold to persons interested in physical development and body building for

just as long a time, going back to Charles Atlas, Bernarr McFadden and Earl Lederman. (Record, pages forty-three, forty-four, forty-seven, forty-eight.) That our magazines are comparable to all the other physique magazines was admitted by the Post Office Department's expert witness. (Record, pages twenty-eight, twenty-nine). In all physique magazines, similar photographs of models are used as a necessary adjunct to the written text, as was also admitted by the Government witness. Therefore, if this Court should agree with the United States Court of Appeals for the District of Columbia, that our magazines must be viewed as physical culture, body building magazines then as such these magazines are constitutionally protected. The Court below apparently gave no consideration to the decisions of this Court in the cases of *Sunshine Book v. Summerfield*, 355 US 372; *Mounce* v. *United States*, 355 US 180. And especially *One, Inc.* v. *Olesen*, 355 US 371. The Post Office Department, the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia placed the interpretation upon the last three mentioned decisions of this Court, which all followed this Court's decision in the case of *Roth* v. *United States*, 354 US 476, that no one knows what this Court intended to say in the last three cases decided. Appellants have argued, at all three hearings below, that this Court, through its decisions in these three cases, intended that all ideas, containing even the slightest amount of socially redeeming value, and though they may be contrary to prevailing public opinion, are constitutionally protected. Our body building, physique magazines, admittedly appealing to a minority of our population are also protected by our Constitution. We admit, that by number, the persons interested in body building are a minority group. The total number of applicants to our national "Mr. America" contest is infinitesmal compared to the total male population of the United States of America. Yet, this minority group has a constitutional right to receive

the magazine in which they have an interest, through the United States Postal Service, regardless of what effect these magazines might have upon any other minority group, and we have a constitutional right to distribute these magazines. It would be impossible to produce any magazine which does not have some appeal to some particularly susceptible groups, such as "homosexuals", as heretofore defined. There is a myriad of every day stimuli, which would appeal to the prurient interest of this minority group of "homosexuals," while the same stimuli would have no effect on other members of the same group. (Record, pages twenty thru twenty-three, twenty-five). No witness is qualified to testify as to what features of our magazines would appeal to the majority of "homosexuals", even if the witness knew with certainty the people who purchased our magazines from newsstands. Of course, this would require the witness to conduct a detailed examination into the sex life of each and every one of our 40,000 monthly purchasers. Our magazines are sold principally through newsstands and bookstores all over the United States, the same method of distribution that is used by practically every other magazine of consequence sold in the United States.

POINT II

Whether appellants' magazines are non-mailable as containing advertisements of where, how, from whom, and by what means obscene material may be obtained in violation of Title 18, Section 1461, United States Code.

This Court in its decision in the case of *Smith* v. *California*, 361 U.S. 147, made it quite clear that no owner of a book store is to be held responsible for having for sale, or selling, obscene literature if that book dealer had no knowledge of the obscene nature of his merchandise. By analogy, appellants contend that no publisher of books or magazines is responsible for the unknown

actions of the people who advertise in his books or magazines. In our case there is no evidence that our publisher knew any contributing photographer was advertising the sale of obscene material. But rather, the evidence showed that we tried to avoid such contributing photographers by following the same procedures, practiced by the Post Office Inspectors, of sending "test letters". The Postal Inspector testified, (Record, page fifty-seven), that he would have difficulty in obtaining pornographic material from the "type of dealers." However, this same Postal Inspector, whose duty it is to investigate for violations of Title 18, U.S. Code, Section 1461, did not purchase any obscene material from any of the advertisers in our magazines. Actually, the obscene photographs which were introduced in evidence at the Post Office hearing, were seized from different photographers, at their studios, pursuant to search warrants and arrest warrants based upon violation of local State statutes prohibiting possession and sale of obscene material and not pursuant to any charge of violation of Title 18, U.S. Code, Section 1461, using the United States Postal Service to convey obscene materials. The Post Office Department, without any regard for fair play, attempted to connect an outside activity of our then publisher, Mr. Womack, doing business as Continental Artists, to our magazines. No where in any of our magazines has there ever appeared any reference to, or advertisement of Continental Artists, (Record, page fifty-six).

Actually, the testimony showed, (Record pages fifty-eight, through sixty-two), that our publisher inquired of the Postal Inspector and offered to delete from our magazines the work of any photographer who had been convicted of using the United States Postal Service to distribute obscene materials. Further, our then publisher, in his own efforts to ascertain the nature of the photographs sold by the advertisers in our magazines, voluntarily cancelled the advertisements of several photogra-

phers who were using the United States Postal Service for distribution of obscene materials, prior to the illegal activities of these photographers being discovered by the Postal Inspector. We have exercised all precautionary measures available to us in an attempt to comply with Title 18, Section 1461, United States Code. The record clearly indicates that appellants had no knowledge of any alleged illegal activities of any contributing photographer or advertiser in our magazines and, therefore, under the doctrine of *Smith* v. *California*, 361 U.S. 147, we should not be held accountable for the unknown actions of the advertisers in our magazines. To rule that our magazines are non-mailable, based upon the record in this case, would set a dangerous precedent requiring every magazine publisher to first purchase, through the United States Postal Service, samples of the products advertised for sale, through the United States Postal Service, in that publisher's magazine. Assuming that a publisher was to follow this policy, as was followed by the publisher of our magazines, based upon the testimony of the Postal Inspector, a series of purchases would be required, the cost would be prohibitive and there would be no guarantee that at a subsequent date the photographer would not alter his material offered for sale through the Postal Service and proceed to distribute obscene material.

POINT III

Whether the appellee, through the Post Office Department procedures, exercised an unconstitutional prior restraint upon appellants' magazines in violation of the First and Fifth Amendments to the Constitution of the United States of America.

Appellants assert that the administrative procedures followed by the Post Office Department, based upon a criminal statute, raises doubts of constitutionality. The fragile foundation on which the Post Office action rests

must be kept in mind, both in dealing with the substantive obscenity question involved and in determining the proper scope of judicial review. It is the duty of the Courts to defend substantive Constitutional rights especially when attacked from a source itself of doubtful Constitutional validity. There is lacking here the kind of specific legislative direction to the administrative agency that in certain circumstances justifies judicial deference to administrative determinations. It is the magazines before this Court that are on trial, not the publishers, although the Post Office Department has taken the contrary view, by attempting to unconstitutionally prohibit from the mails any magazine in which Herman L. Womack was interested.

The Post Office Department conducted an unconstitutional prior restraint on these magazines. It first held the magazines to be non-mailable without notice or hearing allowed the publishers and deprived the appellants the use of the mails. After pressure exerted by the United States District Court, at the instance of the appellants in Civil Action No. 1082-60, United States District Court for the District of Columbia, the Post Office Department held a time consuming hearing, the product of which was an Order contrary to the established law of the United States, which Order based upon the grounds given could have been propounded without any hearing at all. This amounts to the most obnoxious and unconstitutional censorship. The principal effect of the administrative hearing at the Post Office Department is to delay action of the Courts; it is no more than me arguing with myself over what I had already decided to do. The Judicial Officer of the Post Office could not possibly qualify as an administrative expert. Appellants assert that the Post Office Department conducted an ex parte administrative prior restraint treading upon an area of constitutional sensitivity apart from the substantive problems of determining whether or not the magazines are obscene.

All issues of appellants' magazines are dated. They are prepared and delivered to the newsstand dealers and bookstores for sale prior to the current month. The General Counsel of the Post Office Department is not a qualified expert on the subject of what material, considered as a whole, applying contemporary community standards, would appeal to the prurient interest of the purchasing public in our fifty States. Actually, as appellants interpret the decisions of this Court, only a jury would be so qualified. When the General Counsel of the Post Office Department reviews, at his leisure, questioned magazines which have already been withheld from transit through the United States mail, dated magazines become obsolete. Upon the General Counsel of the Post Office Department concluding his *ex parte* determination that a magazine is obscene and non-mailable, a letter is delivered to the publisher of the magazine informing that publisher of the General Counsel's decision and offering the option to the publisher to elect to voluntarily withdraw the questioned magazines from the United States Postal Service or allow their destruction. The magazine publisher then may exercise the alternative of retaining counsel and filing a petition with the Post Office Department, contravening the determination of the General Counsel of the Post Office Department, and requesting a hearing on the merits. Meanwhile, time marches on, and by the nature of the rules adopted by the Post Office Department that month's issue of the magazine becomes obsolete before a hearing examiner is even assigned to try the case. The publisher has just lost one month's income from the sale of his magazines, the Internal Revenue Service has lost one month's income taxes from the publisher, and the reading public has been denied their Constitutional right to purchase and read a magazine of their choice. Appellants in the case at bar, decided to test these unconstitutional procedures; therefore, upon receipt of notice of the General Counsel for the Post Office Department's determina-

tion that our magazines were obscene and non-mailable, a complaint praying for a temporary restraining order and preliminary injunction was filed in the United States District Court for the District of Columbia in Civil Action No. 1082-60, as a result of which the United States District Court for the District of Columbia gave the Post Office Department two weeks in which to conclude all administrative proceedings to determine the mailability of our magazines. After receipt of the Temporary Restraining Order, on April 14, 1960, the General Counsel for the Post Office Department then filed a complaint with the Post Office Department alleging that appellants' magazines were obscene and nonmailable, and later amended that complaint to include a charge that appellants' magazines were nonmailable, in that they contained advertisements where, how, and from whom, obscene material may be obtained. (Record page three). Pursuant to the rules of the Post Office Department, the administrative hearing before one of the Post Office Department hearing examiners, the rendering of a decision by the hearing examiner, the appeal from that decision to the Post Office Department Judicial Officer, and the rendering of a decision by the Post Office Department's Judicial officer would have consumed approximately two months if all parties acted expeditiously. To expedite the administrative procedures, and to allow the Post Office Department to comply with the Order of the United States District Court for the District of Columbia, the appellants stipulated to waive the hearing before a Post Office Department hearing examiner and the appeal from his decision, and consented to the Post Office Department Judicial Officer presiding at the hearing with the final decision of the Post Office Department Judicial Officer exhausting all administrative appeals and remedies. These actions of the Post Office Department appellants assert constitute an unconstitutional prior restraint on our magazines amounting to postal censorship which this Court should never allow.

CONCLUSION

Appellants assert that the magazines in question are not obscene, when tested by this Court's definition of obscenity. Further, appellants assert that the Post Office Department's interpretation of this Court's definition of obscenity is inherently vague and indefinite. Further, appellants assert that even if the Post Office Department's definition of obscenity was applicable to these magazines, as magazines beamed at homosexuals, the magazines would still be constitutionally protected. Appellants assert that these magazines are physique, body-building magazines, and as such, are constitutionally protected. Appellants assert that no magazine publisher should be held responsible for the unknown actions of the contributing photographers and advertisers in any magazines. Appellants assert that this Court should not allow the unconstitutional procedures of the Post Office Department, amounting to a prior restraint upon these magazines, to stand. Therefore, appellants conclude that this Court should hold these magazines to be not obscene and mailable and reverse the decision of the United States Circuit Court of Appeals for the District of Columbia with an Order to the United States District Court for the District of Columbia to grant the appellants' prayers contained in their complaint for injunctive relief, and order the Post Office Department to accept for mailing the appellants' magazines.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 123

MANUAL ENTERPRISES, INC.; TRIM ENTERPRISES, INC.; AND GRECIAN GUILD, PETITIONERS

v.

J. EDWARD DAY, POSTMASTER GENERAL OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Judicial Officer of the Post Office Department (R. 79–88) is not reported. The order of the United States District Court for the District of Columbia (R. 78) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 90–92) is reported at 289 F. 2d 455.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 1961 (R. 93). The petition for a writ

of certiorari was filed on May 29, 1961, and granted on October 9, 1961 (R. 94; 368 U.S. 809). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners' magazines, whose dominant theme is an appeal to the prurient interest of the average person who reads them, but which do not appeal to the prurient interest of the average adult, are obscene and therefore non-mailable under 18 U.S.C. 1461.

2. Whether respondent's factual finding that petitioners had knowledge that their magazines gave information as to where, how and from whom obscene matter could be obtained was supported by the record.

3. Whether respondent's refusal to carry petitioners' magazines in the mail until a determination was made as to their obscenity, and the procedures followed in making that determination, constituted a previous restraint of speech in violation of the First Amendment.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

The First Amendment to the Constitution, and the pertinent portions of 18 U.S.C. 1461 and of the Regulations of the Post Office Department (39 C.F.R. 14.4, 14.9, 203.1–.14) are set forth in Appendix A, *infra*, at pp. 80–85).

STATEMENT

Petitioners are District of Columbia corporations engaged in publishing the magazines *MANual, Trim* and *Grecian Guild Pictorial* (R. 66–67; Exs. 1, 2, 3 and 4). Each of the petitioners had the same address,

and each had the same president, Herman Lynn Womack (*ibid.*; R. 71, 84). Each of the magazines has a claimed circulation of 25,000, of which 12,000 are distributed through the mails (although of this number relatively few copies are mailed directly to subscribers, the bulk being mailed in quantity to distributors) (R. 66–67, 71).

1. On March 25, 1960, petitioners deposited at the Post Office at Alexandria, Virginia, six parcels containing 255 copies of the April *MANual* magazine, 75 copies of the March and May issues of *Trim*, and 75 copies of the May issue of *Grecian Guild Pictorial* for transmission as second class mail to an agent in Chicago (R. 80). The magazines deposited consisted almost exclusively of photographs of nude or nearly nude male models, accompanied by a brief caption giving the names of the model and the photographer (R. 90–91; Exs. 1, 2, 3 and 4). Each magazine also contained a directory or index of the names and addresses of photographers whose photographs were included in the magazine, and a few advertisements for nude photographs (R. 91; Exs. 1, 2, 3 and 4). Believing that the magazines might be non-mailable, the Postmaster at Alexandria forwarded the matter to the General Counsel of the Post Office Department. On April 5 and 7, 1960, the General Counsel notified petitioners' president, Mr. Womack, that he had found the magazines non-mailable and that he had made a tentative determination that withholding the magazines from delivery did not involve the amount of money or quantity of magazines necessary for a formal hearing (R. 80, 81). On April 11, 1960,

petitioners challenged the latter finding and requested a hearing on the mailability of the magazines.[1]

On the same day, the Judicial Officer of the Post Office Department found that the matter offered for mailing was of substantial quantity and value and that petitioners were entitled to a formal hearing. He therefore entered an order providing for proceedings pursuant to the Department's Rules of Practice and Proceedings Relative to Mailability (R. 80). The General Counsel filed a complaint on April 14, 1960, alleging that the magazines were obscene and therefore non-mailable because the dominant effect of each of them was to appeal to the prurient interest of the average member of the audience to whom they were directed, and because each of them provided information as to where, how, and from whom obscene pictures could be obtained (R. 80–81). Petitioners responded on April 18, 1960, and hearing was set for April 21, 1960, before a hearing examiner (R. 80–81). In the interest of expediting the proceedings, the parties stipulated, however, that the Judicial Officer of the Post Office Department should preside at the hearing, and that he should enter

[1] On the same date they filed a suit in the district court requesting an injunction requiring the Postmaster General to carry the magazines through the mail. On April 13, 1960, however, a temporary restraining order was denied and the case was remanded by the district court for a final administrative determination as to the mailability of the magazines. On April 25, 1960, the complaint in that action was dismissed without prejudice, with the proviso that petitioners could seek further relief from the court if no final administrative decision had been made by April 28 (R. 81).

final orders without the taking of exceptions (R. 81–82).

2. The record made at the hearing consisted of petitioners' magazines,[2] the expert opinions and testimony of three psychiatrists and two psychologists,[3] and the lay testimony of several postal officials and one disinterested citizen on behalf of the government. Petitioners offered no witnesses who had any personal knowledge of the facts of petitioners' operations.

a. The magazines contained little textual material, with pictures of male models dominating almost every page (R. 37; Exs. 1–4). The typical page consisted of a photograph, with the name of the model and the photographer and occasional references to the model's age (usually under 26), color of eyes, physical dimensions and occupation. The magazines contained little, either in text or pictures, that could be considered as relating in any way to weight lifting, muscle building or physical culture (R. 6–9; Exs. 1–4).

Many of the photographs were of nude male models, usually posed with some object in front of their genitals (Ex. 1, pp. 1, 12, 18, 19; Ex. 2, pp. 17,

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[2] Each of the magazines in issue was received in evidence without objection (R. 4).

[3] Although two psychiatrists studied the magazines for the government and arrived at the same conclusions, only one of them testified, because petitioners stipulated that the testimony of the second psychiatrist would be materially the same as that of the first (Tr. 184). A clinical psychologist also testified for the government. The petitioners' experts were a psychiatrist and a psychotherapist.

24–25, 35, 47; Ex. 3, pp. 13, 22, 37; Ex. 4, pp. 7, 12, 18, 24–25, 37); a number were of nude or partially nude males with emphasis on their bare buttocks (Ex. 1, pp. 24–25, 36, 47; Ex. 2, pp. 7, 11, 14, 42, 43, 46; Ex. 3, pp. 4, 19, 26, 29; Ex. 4, pp. 12, 16). Although none of the pictures directly exposed the model's genitals, some showed his pubic hair and others suggested what appeared to be a semi-erect penis (Ex. 1, pp. 2, 3, 30, 31, 32, 38, 39; Ex. 2, pp. 21, 31, 40, 44; Ex. 3, pp. 7, 11, 14, 23, 28, 32, 38; Ex. 4, pp. 16, 23, 30, 32, 33, 39, 44); others showed male models reclining with their legs (and sometimes their arms as well) spread wide apart (Ex. 1, pp. 23, 28, 30; Ex. 2, p. 12; Ex. 3, pp. 12, 22; Ex. 4, pp. 12, 20, 36). Many of the pictures showed models wearing only loin cloths, "V gowns", or posing straps (Ex. 1, pp. 20, 22, 29, 35, 40–41; Ex. 2, pp. 1, 2, 3, 4, 5, 9, 10, 26, 27, 28, 38; Ex. 3, pp. 10, 18, 30, 39; Ex. 4, pp. 2, 6, 22, 41, 42); some showed the model apparently removing his clothing (Ex. 1, p. 17, Ex. 2, pp. 13, 18, 19; Ex. 3, p. 36; Ex. 4, p. 46). Two of the magazines had pictures of pairs of models posed together suggestively (Ex. 2, pp. 40, 42, 43; Ex. 4, pp. 13, 45, 48).

Each of the magazines contained photographs of models with swords or other long pointed objects (Ex. 1, pp. 26, 27, 30, 37; Ex. 2, pp. 15, 32, 33; Ex. 3, pp. 9, 16, 24–25; Ex. 4, pp. 17, 29). The magazines also contained photographs of virtually nude models wearing only shoes, boots, helmets or leather jackets (Ex. 1, pp. 23, 28; Ex. 2, p. 46; Ex. 3, pp. 5, 16, 23; Ex. 4, p. 12). There were also pic-

tures of models posed with chains or of one model beating another while a third held his face in his hands as if weeping (Ex. 2, pp. 34, 35, 45; Ex. 3, p. 8; Ex. 4, p. 40).

Each of the magazines also contained a directory of the names and addresses of studios and photographers having photographs for sale (Ex. 1, p. 44; Ex. 2, p. 44; Ex. 3, p. 41; Ex. 4, p. 44). Each directory contained a recommendation by the magazine that its readers support the photographers by buying their photographs, and the *MANual* and *Trim* directories expressly stated that the publishers were familiar with the work of the photographers (*ibid.*).[4] In addition to the directories, the magazines contained advertisements for photographs (Ex. 1, pp. 43, 45; Ex. 2, pp. 37, 40–41, 45, 46; Ex. 3, pp. 36, 40; Ex. 4, pp. 37, 40, 45). While many of the advertisements did not specify exactly what the photographs would depict, many had samples of nude or semi-nude male models, while others employed such phrases as "Male Order," "Fantastic and Fabulous," or "perfectly proportioned, handsome, male models, age 18–26" (*e.g.*, Ex. 2, p. 40). None of the advertisements was for athletic, weight-lifting, or body-building equipment or literature.

b. The government's expert witnesses[5] testified, on the basis of their general professional knowledge and

[4] The *Grecian Guild Pictorial* contained a notice that it "does not knowingly use the work of any studio which takes or sells nude or undraped front or side view photographs. The photographers listed above do not offer such photographs" (Ex. 3, p. 41). See pp. 46–51, *infra*.

[5] See note 3, *supra*, p. 5.

training and of their experience in treating patients who were homosexuals or had homosexual tendencies, that the primary appeal of petitioners' magazines would be to overt, practicing homosexuals and to adolescent males with some latent homosexual tendencies (R. 5, 7–8, 10–11, 18, 19, 33–34, 36, 41), and that the normal adult who read such magazines would be the exception (R. 27). These witnesses testified that the magazines were calculated to and would in fact arouse and excite the prurient sexual interest of the persons to whom they would appeal (R. 5, 6, 9, 20). They testified that the magazines would stimulate practicing homosexuals to engage in overt and unlawful homosexual activities (R. 20, 34), that the magazines would have a tendency to induce adolescents with latent homosexual tendencies to engage in overt homosexual activities and become fixed in a pattern of homosexual acts (R. 10–11, 20, 23, 35), and that the excitement the magazines would arouse in both of these classes of persons would make it more difficult to treat and cure them (R. 16, 20).

Focusing upon particular pictures, the expert witnesses testified that emphasis on the male genitals, whether achieved by showing a semi-erect penis or pubic hair (R. 5, 6, 17–18), posing the model in suggestive attire such as a "V gown" or posing strap (R. 5, 6, 8, 9), placing an object in front of the genitals (R. 6), or otherwise, had a special appeal for male homosexuals (R. 6, 8, 9, 18, 23, 32–33, 39). They testified that emphasis on the naked buttocks would especially stimulate homosexually inclined males because of its suggestion of rectal intercourse (R. 7, 8,

9, 14–15). They also testified that photographs of models in "invitation" poses (*i.e.*, with legs spread apart) or undressing would be calculated to arouse the male homosexual (R. 8, 12–13, 29).

The experts testified that pictures in which virtually nude models were posed with swords or other essentially phallic symbols (R. 13–15, 15–16, 38) or wearing only shoes, a jacket or a helmet (R. 7, 13, 15) appealed to common fetishes among male homosexuals. They also testified that pictures in which models were posed with swords or chains or which depicted the administration of beatings would appeal to other deviants within the homosexual group, such as masochists and sadists (R. 12–13, 38).

The experts testified that the arrangements of the several pictures, either by contrasts in costume or by a "build-up" or climactic sequence, contributed to the effects of the magazines upon homosexuals (R. 6–7, 36–37). They concluded that the dominant theme—indeed, "the only theme" (R. 41)—of the magazines was an appeal to the prurient sexual interests of overt homosexual males or adolescent males with homosexual components (R. 9, 18, 41), and that the appeal would have the effects already discussed. There was also expert testimony that the appeals to prurience went substantially beyond the customary bounds of candor and that the magazines were without literary, scientific or educational value (R. 34).

Petitioners offered the testimony of two expert witnesses, which did not materially contradict the expert testimony described above. Petitioners' experts testi-

fied, in substance, that the magazines did not appeal to the prurient interest of the average normal adult person, and that such a person would not be interested in the publications and would not be likely to buy them (R. 42–43, 47–48, 52). One of them testified that the readers of the magazine would principally be "youngsters" (R. 45). They also testified that a child who looked at the magazine would not as a result become a homosexual, and that mere exposure to magazines of this kind would not turn an adolescent into a homosexual (R. 43, 52).

c. In addition to the magazines themselves and the expert testimony, the government offered evidence showing that the president of each of petitioners, Mr. Womack, knew and had admitted that his magazines were being bought and read primarily by homosexuals (R. 54, 57, 59, 64), and that he intentionally appealed to their sexual instincts by selecting photographs on the basis of the model's "sex appeal" and "pretty faces" (R. 88–89). In a letter to one of his photographers to indicate the kind of photographs he wished to use in his magazines, he stated, "In 1958, physique fans want their 'truck driver types' already cleaned up, showered, and ready for bed" (R. 89; Tr. 291–292). At the hearing, petitioners' counsel apparently conceded that these magazines "admittedly are being beamed at homosexuals" (R. 28). Petitioners offered no factual testimony as to the intent or purpose of the magazines or the audience at which they were directed.

d. Testimony of postal inspectors showed that the inspectors had, under assumed names, written to sev-

eral of the photographers listed in the directories of each magazine. They received pictures of nude men and boys displaying their genitals (Tr. 282, 285–88, 291, 323–29; Exs. C. F. K. L). A private citizen appeared as a witness and testified that he had received photographs of nude men, diplaying their genitals, from one of the photographers listed in the directories (Tr. 338–45; Ex. Q). The postal inspector testified that the practice of dealers selling such photographs was to send borderline material in the earlier purchases, but that if one continued to purchase such material, he could obtain "extremely pornographic" material or "hard core" pornographic pictures (R. 57). Such photographs were obtained from dealers (Bob Anthony, Togot, and Take One Studios) listed in petitioners' magazines in police raids on their studios, including photographs of males engaged in unlawful overt homosexual acts (Tr. 334–38; Exs. M, N and O). The record also revealed that Mr. Womack had recently been convicted for sending obscene photographs of nude male models through the mails (R. 56).[6]

3. On April 28, 1960, the Judicial Officer of the Post Office Department rendered a careful and detailed opinion, holding the magazines non-mailable, both because they were obscene and because they contained information as to where, how, and from whom obscene matter could be obtained (R. 79–88). He

[6] *Womack* v. *United States*, 294 F. 2d 204 (C.A. D.C.), certiorari denied, 365 U.S. 859. Mr. Womack has pleaded not guilty by reason of insanity to more recent charges of sending obscene matter through the mail. See Washington Post, February 1, 1962, p. D3.

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found that the publisher of the magazines planned them to appeal to male homosexuals, and that the average readers of the magazines were not ordinary male adults, but male homosexuals and some adolescent males (R. 85, 86). He found that, considered as a whole, the dominant theme and effect of each of the magazines was an appeal to the prurient sexual interest of the average reader of the magazines (R. 87). He therefore concluded that the magazines were "obscene, lewd, lascivious and indecent" and therefore non-mailable under 18 U.S.C. 1461 (R. 87).

In addition he found that the advertisements and indices in the magazines contained information as to where obscene photographs of nude males and "hard-core" pornographic materials could be obtained (R. 86–87). He expressly rejected petitioners' proposed finding that they had no knowledge that obscene materials could be obtained from the photographers listed in the directories in their magazines (R. 87; App. B, *infra*, p. 86). He therefore concluded that the magazines were non-mailable under 18 U.S.C. 1461 for the additional reason that they contained "information as to where, how and from whom obscene materials may be obtained" (R. 87).

4. On May 13, 1960, petitioners brought this action against the respondent in the district court, alleging that the magazines were not obscene and were entitled to the protection of the First Amendment, although conceding that "[t]he preponderance of the expert testimony showed that the magazines in question * * * would appeal to the prurient interest of the homosexuals" (R. 68). The case was submitted

to the district court upon the administrative record and upon cross-motions for summary judgment (R. 71–72, 74–78). The district court held that the respondent was entitled to judgment as a matter of law, and entered an order (without opinion) granting respondent's motion and dismissing the complaint (R. 78).

The court of appeals unanimously affirmed (R. 90–92).[7] The court (per Bastian, J.) expressly rejected petitioners' contention that the magazines were not obscene within the meaning of *Roth* v. *United States*, 354 U.S. 476, because they did not appeal to the prurient interest of the average adult. In the court's view (R. 92):

> [T]he real meaning of *Roth* is that the object in question is not to be considered in terms of the reaction of an isolated atypical consumer. A case of obscenity thus is not to be predicated on the reaction of the peculiarly prudish or susceptible, and neither is a defense to such a charge to be predicated on the lack of reaction on the part of the peculiarly jaded. * * * The proper test in this case, we think, is the reaction of the average member of the class for which the magazines were intended, homosexuals. The testimony of record was clearly to the effect that these magazines would arouse prurient interest in the average homosexual. * * *

The court also held that there was substantial evidence for the conclusion that the magazines were non-mailable because they provided information as

[7] Judge Fahy concurred in the result (R. 92).

to where and how obscene matter could be obtained (R. 92).

SUMMARY OF ARGUMENT

I

A. The determination of whether material is obscene or not should be made in terms of its effect upon the audience to which it is directed and by which it is purchased. The magazines held to be non-mailable in this case were primarily intended for and purchased by male homosexuals, and adolescents with some latent homosexual tendencies. Respondent and the courts below properly determined the obscenity of the magazines in terms of their appeal to the prurient interest of the average purchaser, in this case the male homosexual, rather than (as petitioners urge) in terms of their appeal to the prurient interest of the average normal adult, who would have no interest in the magazines and would be unlikely to buy or read them.

A standard keyed solely to the average normal adult would conflict with the congressional purpose in enacting the legislation in issue here (18 U.S.C. 1461). That statute was designed to prevent the postal system from becoming a vehicle for the cheap dissemination of materials which, either through immediate stimulation or a gradual erosion of accepted moral standards, induce unlawful and immoral sexual conduct. Petitioners' standard would leave those who commercially exploit the prurient interest of adolescents, and of homosexuals, sadists or other persons with deviant sexual impulses, free to sell their pornography without restraint from the federal or state governments, so long as their material does not appeal to the

prurient interest of the average normal adult. Since pornography is likely to have a greater impact upon adolescents and sexual deviants and is more likely to result in unlawful conduct in such cases, petitioners' suggested standard for determining obscenity would free the most pernicious pornography, while permitting the restraint only of that which is aimed at normal adults who are least likely to be adversely affected by it. For these reasons, the serious students of the relationship between law and obscenity, including the drafters of the Model Penal Code, agree with the courts below that obscenity should be determined with reference to the average purchaser of the material rather than to a hypothetical "average person in the community."

The determination of obscenity in terms of its appeal to the prurient interest of its intended and actual audience is consistent with *Roth* v. *United States*, 354 U.S. 476. The decisions of the federal courts, both before and after *Roth*, have appraised the obscenity of materials directed to special audiences in terms of their effect upon the average member.

B. The Judicial Officer of the Post Office Department, as well as the two courts below that affirmed his findings, correctly applied the foregoing standard to the facts of this case. The uncontradicted evidence supported the Judicial Officer's finding that petitioners' magazines were intended by their publishers to appeal to male homosexuals. The expert testimony established that male homosexuals and adolescent males with homosexual tendencies were the

actual audience of these magazines and, as petitioners conceded, that the magazines appealed to their prurient interest. Finally, the expert testimony and the magazines themselves permitted of no conclusion other than that this appeal to the prurient interest of homosexual males was the dominant theme of the magazines and that they had no redeeming literary, scientific or other qualities; and the Judicial Officer so found. Petitioners' magazines are, therefore, plainly obscene and nonmailable.

II

Petitioners' magazines were properly found by the Judicial Officer (affirmed by both courts below) to be non-mailable for the additional reason that they contained information as to where and from whom obscene matter could be obtained. Each of them contained advertisements and a directory of photographers from whom pictures of nude male models could be purchased. The Judicial Officer found that photographs so obtained were obscene as appealing to the prurient interest of homosexuals. The record also established that "hard-core" pornographic material could be obtained from some of the photographers listed in petitioners' magazines, and the Judicial Officer so found. Petitioners did not dispute any of these findings.

The Judicial Officer expressly rejected petitioner's contention that they had no knowledge of the kind of materials sold by the listed photographers. Petitioners' president was fully aware of the activities of the photographers listed in the magazines, and the

advertisements in the magazines themselves put petitioners on notice that the advertisers disseminated obscene matter. Furthermore, the record establishes that petitioners did not make good faith efforts to exclude advertisers of obscene matter.

III

A. The procedures followed in this case were those prescribed by Post Office regulations, which provide for a speedy determination of the mailability of each item deposited for mailing of which there is doubt or dispute as to its mailability. The regulations provide for an initial determination by the General Counsel of the Post Office Department, upon referral by any postmaster who doubts the mailability of an item. If the initial determination is that the item is nonmailable, it is held (subject to withdrawal by the mailer) pending administrative determination by an impartial adjudicatory official after a full adversary hearing. The regulations require expeditious treatment and decision of such cases; in this instance the final administrative decision was made only 34 days from the day the magazines were deposited for mailing.

B. The only restraint imposed by these procedures is that required by the statute—namely, the refusal to convey in the mail material believed to be obscene unless and until it is determined not to be obscene. Any other construction of the statute would require the postal authorities to deliver the materials before a determination could be made as to their obscenity and mailability, and thereby assist in the commission of

a crime. The legislative history of the statute shows that it was intended to authorize the postal authorities to exclude obscene materials from the mails and to refuse to convey or deliver them, as well as to punish those who mailed such materials.

Subsequent statutes have reinforced the authority originally granted and have imposed upon respondent and his agents the duty to refuse to convey such materials through the mails or to deliver them. The statute here is, moreover, part of a comprehensive statutory pattern prohibiting the conveyance in the mails or delivery of a large variety of objectionable materials, including explosives and intoxicating liquors, and the power of the postal authorities to remove these materials from the mails pending determination of their mailability has never been questioned. Finally, the refusal of the Post Office Department to deliver materials believed to be obscene until there has been an authoritative ruling on their mailability reflects a consistent administrative practice extending over many years.

C. The statutory directive to the Post Office Department to refuse to carry obscene materials pending a mailability determination does not impose a previous restraint, in violation of the First Amendment. That refusal is not a *previous* restraint because it applies only to materials after they have been published. Moreover, the refusal to carry such material through the mails constitutes, in itself, no effective *restraint,* because it does not impair the publisher's ability to distribute his periodicals through other channels and by other means of transportation. Fewer

than half of petitioners' magazines were normally delivered by mail. In these respects, such restraint as was imposed by the postal authorities' refusal to carry the material in question was substantially less severe than that imposed by the restrictions on the dissemination of obscenity recently upheld by this Court in *Kingsley Books* v. *Brown*, 354 U.S. 436.

Obscenity is not, of course, within the area of speech protected by the First Amendment. However, in order to insure the free flow of non-obscene literature, it is necessary that there be adequate safeguards and standards for determining what is and what is not obscene. The speedy and particularized administrative procedure established for determining the mailability of possibly obscene matter does provide such safeguards. Whatever minor disabilities it imposes in the way of a brief delay are eminently reasonable in relation to the overriding public interest, expressed in the Act of Congress involved here, in preventing the dissemination of obscene material.

The constitutionality of the provision making obscene material non-mailable and authorizing its removal from the mails pending determination as to its mailability has been accepted without challenge for 85 years. It is fully supported by many decisions of this Court and of the lower federal courts. There is no basis for overturning it now.

ARGUMENT

I. PETITIONERS' MAGAZINES WERE PROPERLY FOUND TO BE OBSCENE AND NON-MAILABLE

Petitioners mount a two-fold attack upon the conclusions of respondent and the courts below that the magazines in question were obscene and therefore nonmailable. They challenge the standard for determining obscenity used by respondent and the courts below, focusing as it did upon the effect of the magazines on their average reader, rather than on the average person in the community. Thus, although the average readers of the magazines were homosexuals, and the average normal adult would have no interest in and would not be likely to purchase or read them, petitioners contend that the magazines cannot constitutionally be found to be obscene, since they do not appeal to the prurient interest of the "average, normal adult" (Pet. Brief, pp. 26–30). In the other phase of their attack, petitioners in various ways contest the findings of fact arrived at below to the effect that the dominant theme of the magazines was an appeal to the prurient interest of homosexuals, the persons who were their intended and actual audience. Petitioners contend that "intent" is irrelevant, that "homosexuals" is not a definable class, and that the dominant theme of these magazines was body-building and muscular development (Pet. Brief, pp. 8–30).

In this point of our argument we show first that, where, as in this case, it is clear from the record that the reading matter was especially designed for, directed to, and read by an audience of atypical persons (here, homosexuals), obscenity should be judged in

terms of the average reader, not by the average adult who would have no interest in the magazines and (except out of curiosity) would never have occasion to see them. Secondly, we show that the respondent and the courts below properly applied this standard to the facts of record when they found that homosexuals were the intended and actual readers of these magazines, that the magazines appealed to the prurient interest of these individuals, and that this appeal was the dominant theme of the magazines.

A. THE OBSCENITY OF READING MATTER SHOULD BE JUDGED IN TERMS OF ITS EFFECT UPON THE AVERAGE READER, NOT UPON THE AVERAGE PERSON IN THE COMMUNITY

Any doubt that obscenity is not within the area of constitutionally protected speech or press was laid to rest by this Court's decision in *Roth* v. *United States*, 354 U.S. 476.[8] Petitioners do not argue to the contrary; neither do they argue that the statute involved, 18 U.S.C. 1461 (App. A, *infra*, pp. 80–81), is unconstitutional on its face. Petitioners would, however, have this Court rule that all material which does not appeal to the prurient interest of the average, normal adult is automatically not obscene and therefore protected by the First Amendment—regardless of the

[8] For other areas of speech beyond the protection of the First Amendment, see *Donaldson* v. *Read Magazine*, 333 U.S. 178, 191 (fraudulent representations); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (same); *Beauharnais* v. *Illinois*, 343 U.S. 250, 266 (libelous utterances); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–572 (disorderly language in public). Although the obscenity question had not been squarely presented in a constitutional setting prior to the *Roth* case, the Court "always assumed that obscenity is not protected by the freedoms of speech and press." 354 U.S. at 481, and cases cited.

fact that it is not read by the average person, no matter how blatant its appeal to the prurient interest of homosexuals or other special audiences, and no matter how probable it is that the material will lead to unlawful and immoral conduct (Pet. Brief, p. 26). This contention is supported neither by reason nor by precedent.

The federal statute which prohibits the carriage in the mails of obscene matter is addressed to the same social problem that has led the States to outlaw the sale or exhibition of such matter.[9] Although the precise scope and character of that problem have frequently been left unarticulated it seems clear that, in adopting 18 U.S.C. 1461, Congress at the very least intended to prevent the postal system from becoming a vehicle for the cheap dissemination of materials which, either immediately or through a gradual erosion of accepted moral standards, would induce unlawful and immoral sexual conduct.[10] As two of

[9] Hearings before the Senate Judiciary Subcommittee to Investigate Juvenile Delinquency, 84th Cong., 1st Sess. (May 24, 1955), pp. 49–52.

[10] Numerous other policy reasons for condemning obscenity have been authoritatively suggested. The late Zechariah Chafee, for example, asserted that obscenity has been universally outlawed primarily to protect individuals against an affront to the sensibilities. Chafee, *Free Speech in the United States*, 529–54. A noted anthropologist, on the other hand, believes that control of obscene matter is one of society's devices for assuring the healthy interest and controlled conduct in sexual affairs which leads to a stable family and enough children to maintain the community. Margaret Mead, "Sex and Censorship in Contemporary Society," in *New World Writing, Third Mentor Selection*, 9–17 (1953).

the Nation's "outstanding authorities on obscenity" [11] have observed:

> The primary evil aimed at by obscenity censorship is the danger that through stimulating sexual desire obscene literature will lead to sexual conduct that is illegal or otherwise inconsistent with current moral standards.[12]

The belief that obscenity and pornography will induce such conduct is represented in the uniform legislative judgment that the commercial exploitation of such material should be outlawed. Although there has been no conclusive scientific demonstration of either its validity or invalidity,[13] that belief is supported by the opinions of leading law enforcement officers,[14] prominent laymen,[15] and in this case by expert psychiatric and psychological testimony (R. 10–11, 19–20, 34–35).

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[11] *Roth* v. *United States*, 354 U.S. 476, 509 (dissenting opinion of Mr. Justice Douglas).

[12] Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 Minn. L. Rev. 295, 382–383.

[13] Kronhausen, *Pornography and the Law*, 23, 261–262; Lockhart and McClure, *op. cit., supra* note 12, 38 Minn. L. Rev. at 394; *Roth* v. *Goldman*, 172 F. 2d 788, 792 (C.A. 2) (concurring opinion), certiorari denied, 337 U.S. 938.

[14] *E.g.*, Donald S. Leonard, Chairman, Conference of International Association of Chiefs of Police, quoted in Report of the House Select Committee on Current Pornographic Materials, H. Rep. 2510, 82d Cong., 2d Sess., p. 114; and J. Edgar Hoover, quoted in Harpster, *Jurisprudence, Obscene Literature*, 34 Marq. L. Rev. 301, 302.

[15] *E.g.*, Dr. Joseph M. Dawson, Executive Director, Joint Committee on Public Affairs for the Baptists of the United States, Hearings before the House Post Office and Civil Service Committee on H.R. 569, 83d Cong., 2d Sess., p. 8.

It is of course settled that the obscenity of matter directed to and read by the general public should be judged in reference to its effect upon the average person in the community, and not by its effect upon particularly susceptible persons. *Roth* v. *United States*, 354 U.S. 476, 488–489. Compare *Regina* v. *Hicklin* [1868] L.R. 3 Q.B. 360. Thus, a book directed to the general reading public cannot be held to be obscene because of its potentially deleterious effect upon youth; to do so would be to restrict the reading of the adult population, in matters relating to sex, to literature which is safe for children. *Butler* v. *Michigan*, 352 U.S. 380, 383; see *Volanski* v. *United States*, 246 F. 2d 842 (C.A. 6). see also *United States* v. *Kennerly*, 209 Fed. 119 (S.D.N.Y.) But this Court has not been squarely presented with the problem presented by the case at bar—namely, pornographic material directed to and received by an atypical segment of the population, in this instance male homosexuals and adolescents with latent homosexual tendencies. The same problem is presented in cases involving material directed to and received by other limited segments of the population, such as adolescent children, or adults with sadistic or masochistic sexual tendencies. The Post Office Department's Judicial Officer and the courts below met the problem by considering the magazines with reference to their effect upon the average member of the intended and actual audience, not by their effect upon the average person in the community, who, if he read them at all, would be an atypical reader (R. 86, 92).

The validity of this standard is substantiated by the conclusion of those who have devoted themselves to the study of the relationship between law and obscenity. In their view, where material is directed to a particular group within the community, obscenity should be determined with reference to the average person in the intended and actual group, rather than to the average person in the community. See, *e.g.*, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 70–88; St. John Stevas, *Obscenity and the Law,* 202–203, and Appendix II, pp. 212, 213 (London, 1956); A.L.I. Model Penal Code, Tentative Draft No. 6, § 207.10(2), and comments at p. 11 (1957). Perhaps most significant in this regard is the statute recently adopted in England as the culmination of a sustained effort on the part of leading literary figures to reform the existing law relating to obscenity. See Williams, *The Obscene Publications Act, 1959,* 23 Mod. L. Rev. 285; and see St. John Stevas, *Obscenity and the Law,* Introduction by A. P. Herbert, and pp. XIX–XX, 189–96, 202–03, and Appendix II, 209–16. The Act was intended, *inter alia,* to replace the *Hicklin* test (*Regina* v. *Hicklin, supra*), by which allegedly obscene material is judged by its effect upon the most susceptible persons. H. Comm. Paper 123–I of 1958, paras. 14–17. The new Act provides that the material is to be judged in terms of its effect upon "persons who are likely * * * to read * * * it." Obscene Publications Act, 1959, Secs. 1, 7, and 8 Eliz. 2, c. 66; 39 Halsbury's Stat. of Eng. 268 (2d ed.).

It seems clear that the obscenity standard by which 18 U.S.C. 1461 is applied must be in terms of the effect of the material upon the persons who are intended to, and actually do, see it. If obscenity is always to be measured with reference to the average person in the community, regardless of the intended and actual audience for the material, then there is no way of dealing with those who would commercially exploit the adolescent interest in sexual matters by selling to teenagers pornography expressly designed to appeal to their prurient interest, so long as it does not excite the average mature adult. If the standard for measuring obscenity is inflexibly geared to the interests and reactions of the normal adult, then those who gain their livelihood by pandering to the warped interests of perverts and other sexual deviants would find their activities constitutionally protected; under petitioner's standard, "hard-core" pornography consisting of photographs of males engaged in abnormal and unlawful sexual acts (*e.g.*, Exs. M and N) could not be outlawed as obscene, because, although openly appealing to the prurient interest of homosexuals, it would only affront the average normal adult.[16]

The absurdity of a standard keyed only to the average adult becomes even more apparent when it is considered that the statute restricting traffic in obscenity was intended primarily to prevent such mat-

[16] Indeed, there is authority for the proposition that even heterosexual pornography does not appeal to the prurient interest of the average adult, but appeals only to the cravings of the sexually immature for erotic fantasy. Lockhart and McClure, *Censorship of Obscenity, The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 72–73; see also *id.* at 62–65.

ter from inducing the readers—whether they are "normal," "adult," or otherwise—to engage in unlawful sexual activities. See pp. 22 *ff.*, *supra*. There was uncontradicted psychiatric testimony in this case, based upon experience gained in the treatment of homosexual patients, that the magazine in issue here, and the photographs obtainable from their advertisers, appealed to and stimulated the sexual appetites of the intended and actual consumers—both latent and practicing homosexuals—and thereby tended to induce them to engage in perverted acts (R. 10–11, 19–20, 34–35). The record indicates that pornographic material directed to sexual deviates is more likely to induce overt sexual activity than such material directed to the normal sexual impulses (R. 34–35; see also Hearings before the House Post Office and Civil Service Committee on H.R. 569, 83d Cong., 2d Sess., p. 22). And since overt homosexual acts are uniformly outlawed, pornographic material directed to a sexually abnormal audience is even more likely to induce unlawful conduct than pornographic material appealing to normal persons. Yet under the standard advocated by petitioners, such materials would be beyond control, while matter which appeals to the prurient sexual interest of the average person (who in most instances has a lawful outlet for his sexual drive) can constitutionally be condemned. Under that criterion, too, materials which were designed for and read by children under sixteen, and which appealed to their prurient interest, would be constitutionally protected, although they had a tendency

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to induce immoral or unlawful conduct on the part of children.[17] In short, under petitioners' criterion the federal and state legislatures could not prohibit the commercial exploitation of the prurient interest of those groups in society whose conduct is most likely to be adversely affected by pornography, but they can prohibit similar exploitation of the prurient interest of the average adult, who is least likely to be affected. The statute will not support, nor can the Constitution be thought to require, such an anomalous result.

Certainly no such result is required by this Court's decision in *Roth* v. *United States*, 354 U.S. 476, where the Court upheld the constitutionality of 18 U.S.C. 1461. The order granting certiorari limited the Court's review to that question, and excluded from consideration any problems concerning the determination of the obscenity of the particular materials there involved (352 U.S. 964; see Petition for Certiorari, No. 582, O.T. 1956, pp. 2–3). In discussing the scope of the constitutionally unprotected area of obscenity, the Court defined obscenity in the following terms (354 U.S. at 487):

> Obscene material is material which deals with sex in a manner appealing to prurient interest[20]
>
> * * *
>
> [20] *I.e.*, material having a tendency to excite lustful thoughts. * * * [the Court's footnote].

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[17] Compare Note, "*For Adults Only*": *The Constitutionality of Government Film Censorship by Age Classification*, 69 Yale L.J. 141.

The Court went on to approve, as constitutionally sound, the standard for determining obscenity that had been adopted in the more recent decisions of American courts (354 U.S. at 488–89):

> The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. *Regina* v. *Hicklin,* [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest. The *Hicklin* test, judging obscenity by the effect of isolated passages upon the most susceptible persons, *might well encompass material legitimately treating with sex,* and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity. [Emphasis added; footnotes omitted.]

The language just quoted does not support petitioners' view that obscenity must invariably be judged in accordance with its effect upon the average person. The rule in the *Hicklin* case was disapproved because that rule, by focusing on the effect of isolated passages upon the most susceptible persons, might condemn "material legitimately treating with sex". The reference to the "average person" was in contrast to "particularly susceptible persons" as used in the *Hicklin* rule. Nothing in the *Roth* opinion indicates

that the Court intended to lay down an inflexible and universal rule that obscenity must always be judged in terms of its effect upon the average person, regardless of the intended and actual audience.

Rather, we think, the Court's approval of the *Roth* charge to the jury, and its citations of authority, show that the reference to the "average person" was to the average person likely to read the material, so that the intended and actual audience for the publication should be considered in determining obscenity. Thus, the district court in the *Roth* case charged the jury that the test is the effect of the material "upon all those whom it is likely to reach."[18] 354 U.S. at 490. And perhaps of more significance are some of the cases cited by the Court (354 U.S. at 489, n. 26) as setting forth the modern and approved standard for determining obscenity. Those cases phrased the test in terms of the effect of the material upon the actual or probable audience: "upon all those whom it is likely to reach" (*Parmelee* v. *United States*, 113 F. 2d 729, 731 (C.A. D.C.)); or upon "the reader to whom it is sent" (*United States* v. *Levine*, 83 F. 2d 156, 158 (C.A. 2)), accord: *United States* v. *Dennett*, 39 F. 2d 564, 568 (C.A. 2) (matter held not obscene if distributed to adults, although possibly obscene if distributed to children); *Walker* v. *Popenoe*, 149 F. 2d 511, 512 (C.A. D.C.) ("[t]he effect of a publication on the ordinary reader is what counts"); *Khan* v. *Leo Feist*, 70 F. Supp. 450, 458 (S.D. N.Y.), affirmed, 165

[18] In *Roth*, the books were directed to the general reading public, and the district court quite properly equated the audience with the average person in the community.

F. 2d 188 (C.A. 2) ("hearers" or "intended auditors"). The Court also (354 U.S. at 487, n. 20) cited the Model Penal Code of the American Law Institute, which defines obscenity in terms of its actual audience (see p. 25, *supra*.).

In addition to the decisions cited with approval by the Court in the *Roth* case, there had been many other instances in which material was held to be obscene because of the audience to which it was directed. See *e.g.*, *United States* v. *Rebhuhn*, 109 F. 2d 512, 514–515 (C.A. 2), certiorari denied, 310 U.S. 629 (per L. Hand, J.); see also, *United States* v. *Levine*, 83 F. 2d 156, 158 (C.A. 2); *Burnstein* v. *United States*, 178 F. 2d 665 (C.A. 9). Since the *Roth* decision, three federal appellate rulings (in addition to the decision below) have held that the obscenity of materials must be determined by their effect on the intended and actual audience, so that materials directed toward homosexuals or other deviant groups are obscene if their dominant theme is an appeal to the prurient interest of the average member of the audience. *Womack* v. *United States*, 294 F. 2d 204 (C.A.D.C.), certiorari denied, 365 U.S. 859; *Collier* v. *United States*, 283 F. 2d 780 (C.A. 4), certiorari denied, 365 U.S. 833; *Klaw* v. *Schaffer*, 251 F. 2d 615 (C.A. 2), affirming, on opinion below, 151 F. Supp. 534 (S.D.N.Y.), judgment vacated with orders to dismiss the complaint as abated, 357 U.S. 346. See also *United States* v. *Oakley*, 290 F. 2d 517, 519 (C.A. 6).

In *Womack* v. *United States*, *supra*, the court below affirmed the conviction of Herman Lynn Womack, president and publisher of all three petitioners, under

18 U.S.C. 1461, for sending through the mails obscene photographs of nude males and information as to where such photographs could be obtained. The Court noted that the audience for the photographs was made up of homosexual males, and that the photographs were obscene as appealing to the morbid interest in nudity, beyond the customary limits of candor. In *Collier* v. *United States, supra,* the Court of Appeals for the Fourth Circuit affirmed a conviction for the same kind of offense involving the same kind of subject matter.

In *Klaw* v. *Schaffer, supra,* the Court of Appeals for the Second Circuit upheld a ruling by the Post Office Department, under 39 U.S.C. 259a, that an individual was conducting an enterprise for obtaining money through the mails for obscene matter. The matter consisted of "pin-up" pictures, photographs and motion pictures of scantily clad women, bound, gagged and fettered, or wearing tightly laced or strapped girdles, boots, belts, straitjackets or other constricting clothing. The expert testimony before the hearing examiner was that the materials appealed to the prurient interest of certain sexual deviates with sadistic or masochistic tendencies. 151 F. Supp. at 537–38. The Court of Appeals for the Second Circuit, in an opinion following and citing this Court's decision in *Roth*, approved and adopted the opinion of the district court which held that material directed at and appealing to the prurient interest of sexual deviates

is obscene. 251 F. 2d 615, affirming 151 F. Supp. 534, 538–539.[19]

On the other side of the coin, there were other decisions before the *Roth* case in which matter was held *not* to be obscene because of the character of the audience to which it was directed. See, *e.g.*, *Consumer's Union of U.S.* v. *Walker*, 145 F. 2d 33 (C.A. D.C.); *United States* v. *Nicholas*, 97 F. 2d 510 (C.A. 2). See also, *United States* v. *Dennett*, 39 F. 2d 564 (C.A. 2). To the same effect is a recent district court decision, which strikingly illustrates the invalidity of petitioners' suggested standard that obscenity be judged on the basis of its appeal to the average person. *United States* v. *31 Photographs*, 156 F. Supp. 350 (S.D.N.Y.), involved erotic photographs, concededly appealing to the prurient interest of the average person, which the Kinsey Institute had imported for scientific investigation. The district court ruled—properly, we think—that the materials must be judged in terms of their effect upon the average person who will have access to them; and that, since there was no reasonable probability that the materials would appeal to the prurient interest of the scientists who were to receive them, they should not be considered to be obscene. 156 F. Supp. at 354.

Petitioners cannot draw comfort from this Court's decisions in *Alberts* v. *California*, 354 U.S. 476, and *Kingsley Books* v. *Brown*, 354 U.S. 436, handed

[19] The district court held alternatively that the material also appealed to the prurient interest of the average person.

down the same day as the *Roth* decision. In *Alberts* (which was treated in the same opinion with *Roth*), the pornographic materials consisted of photographs, commonly known as bondage or torture pictures, and other materials designed for persons with sadistic or masochistic sexual impulses. See the record in *Alberts* v. *California*, No. 61, O.T. 1956, pp. 27–28, 39–40, 55, 91. Although the point apparently was not argued, this Court's upholding of the criminal conviction based upon possession of such material for sale would seem to indicate that obscenity includes pornographic material directed solely to atypical groups within society, as well as material directed to the adult with normal sexual impulses. Similarly, by affirming the state court decisions in *Kingsley Books* v. *Brown*, *supra*, the Court upheld an injunction against the distribution of pornography which was, at least in large part, directed to persons with sadistic, masochistic and otherwise perverted sexual impulses.[20] Although the point was not argued in either case, it is reasonable to assume that had this Court intended to exclude from the area of obscenity materials directed solely to the prurient interests of atypical segments of society, it would have so held in the *Kingsley Books* and *Alberts* cases.

There is no substance to petitioners' charge that, by employing a standard that focuses upon homosexuals as a group, respondent (and impliedly the courts below) acted with "blind prejudice, supersti-

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[20] *Burke* v. *Kingsley Books*, 208 Misc. 150, 158–159, 142 N.Y.S. 2d 735, 742–743, affirmed *sub nom. Brown* v. *Kingsley Books*, 1 N.Y. 2d 177, 134 N.E. 2d 461, affirmed, 354 U.S. 436.

tion, hatred and condemnation of non-conformity" (Pet. Brief, p. 25). The Post Office Department refused to carry petitioners' magazines in the mails because their dominant theme was an appeal to the prurient interest of their purchasers. This standard of obscenity makes no invidious distinction between groups within society;[21] nor has respondent singled out petitioners for treatment differing from that accorded other "merchants in obscenity"[22] who pander to prurient sexual interest.

The vice of petitioners' magazines is not, of course, that they are directed to homosexuals. Their vice, we emphasize, is that they are designed as sexual stimulants for their intended audience, without any legitimate message or purpose, and without "having even the slightest redeeming social importance." *Roth* v. *United States, supra,* 354 U.S. at 484. These considerations distinguish petitioners' magazines from the magazine involved in *One, Inc.* v. *Olesen,* 355 U.S. 371. *One* magazine, like the magazines in this case, was directed to an audience of homosexuals. This is the only similarity between the two cases. The issue of *One* involved in that case was made up prin-

[21] There is, of course, no basis for petitioners' assertion that literature or art may be considered obscene under the standards adopted by respondent and the courts below because the author or artist was a homosexual or that the subject matter concerned homosexuals or their problems (Pet. Brief, p. 25). The standard, unlike that advocated by petitioners, measures obscenity by its intended and actual appeal to the prurient interest of the intended and actual readers, without distinctions based upon the personal proclivities of the publisher, author, subject, or reader.

[22] *Kingsley Books* v. *Brown*, 354 U.S. 436, 444.

cipally of textual material describing the legal and social plight of homosexuals in the United States. The only materials in the magazine alleged to be obscene were one short story concerning a lesbian love affair, and a short poem. *One, Inc.* v. *Olesen*, 241 F. 2d 772 (C.A. 9), reversed, 355 U.S. 371. Even assuming this material to have been obscene in isolation, the Court could well have concluded that the dominant theme of the magazine taken as a whole could not be considered an appeal to the prurient interest.[23]

B. PETITIONERS' MAGAZINES WERE PROPERLY FOUND TO HAVE AS THEIR DOMINANT THEME AN APPEAL TO THE PRURIENT INTEREST OF THEIR INTENDED AND ACTUAL READERS

As we have shown in the foregoing section, the standard to be applied in obscenity cases is whether

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[23] There is nothing in the three remaining *per curiam* decisions of this Court dealing with obscenity during the October Term, 1957, to support the petitioners' contention that the obscenity of material must always be judged with reference to its effect upon the average person, rather than the average reader. *Times Film Corp.* v. *Chicago*, 355 U.S. 35; *Mounce* v. *United States*, 355 U.S. 180; *Sunshine Book Co.* v. *Summerfield*, 355 U.S. 372. In the *Mounce* case, the Solicitor General made a confession of error, agreeing that the court below (in its pre-*Roth* decision) had not followed the standard for determining obscenity approved in *Roth*. Memorandum for the United States in No. 542, O.T. 1957, pp. 6–8. The case was accordingly remanded for consideration in accordance with that decision. In the two other cases, the Court ruled only that, considered as a whole, the materials could not be said to have as their dominant theme an appeal to the prurient interest or to be wholly without redeeming social value. Comment, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. Chi. L. Rev. 279, 309–13; *Collier* v. *United States*, 283 F. 2d 780, 782 (C.A. 4), certiorari denied, 365 U.S. 833; Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5, 34.

the material in question has as its dominant theme an appeal to the prurient sexual interest of the persons who make up its audience. We now show that the Judicial Officer of the Post Office Department and the two courts below correctly applied this standard to the facts of this case as they were established on the administrative record. All three found, as the evidence required them to find, that the issues of *MANual, Trim* and *Grecian Guild Pictorial* here involved were intended for and were in fact read primarily by homosexual men, and that their dominant theme was an appeal to the prurient sexual interest of those intended and actual readers.

The Post Office Department's Judicial Officer found that the publisher of petitioners' magazines "deliberately planned these publications so that they would appeal to the male homosexual audience" (R. 86) and that "the readers of these publications consist almost entirely of male homosexuals and possibly a few adolescent males" (R. 85). He further found that each magazine "considered fully as a whole * * * appeals to the prurient interest of the average reader of such magazines" (R. 86), particularly noting the "danger of the possible luring of * * * an adolescent reader into the abnormal paths of the homosexual" (*ibid.*). He found that "there is no amount of literary, scientific or other material in these issues of the publications which would in any way offset the effect of the main contents" (R. 85) and concluded that the magazines "have as their dominant theme and effect taken as a whole an appeal to [the] prurient interest" of "the average reader for whom they are designed

and published and who are the special audience to whom they are directed, and to whom the magazines are sold and by whom they are read" (R. 87).

Both the district court and the court of appeals upheld these administrative findings as supported by "substantial evidence" (R. 78, 91–92),[24] and the court of appeals also found that the findings were "amply" and "clearly" supported by the record (R. 92). Petitioners have made no "very obvious and exceptional showing of error" warranting a departure from this Court's usual practice of refusing to review the concurrent findings of the administrative tribunal and the two courts below. See *Graver Tank & Mfg. Co., Inc.* v. *Linde Air Products Co.*, 336 U.S. 271, 275; see also *Great A. & P. Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147; *The Germanic*, 196 U.S. 589. In any event, a summary examination of the administrative record will demonstrate that it admits of no other conclusion than that arrived at by the Judicial Officer and approved by the courts below.

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[24] Since the standards of review in these cases is set forth in the Administrative Procedure Act (5 U.S.C. 1009), we believe that the courts below were correct in applying the "substantial evidence" test. We do not discuss the standard of review, however, because the question has not been raised by the petitioners in the petition or in their brief. U.S. Sup. Ct. Rule 15–1(c)(1), and see *Roth* v. *United States*, 354 U.S. 476, 490 n. 27. A discussion of the standard of review in this case would, at any rate, be academic, because the pertinent testimony was uncontradicted and the findings of basic fact are supported not only by substantial evidence but by virtually all of the evidence in the record. We do not, of course, question this Court's authority to reexamine the evidentiary basis for the conclusions reached on the constitutional issues. *Niemotko* v. *Maryland*, 340 U.S. 268.

The evidence showing that the magazines were designed and intended to appeal to the prurient interest of male homosexuals was uncontradicted. Three witnesses testified that the publisher of the magazines, Mr. Womack, had admitted that they were designed for and read by an audience of male homosexuals (R. 54, 57, 59, 63, 64; see also Exs. S and T); and petitioners' counsel apparently conceded at the hearings that the magazines "admittedly are being beamed at homosexuals" (R. 28). In his business correspondence, Mr. Womack observed that the audience to which his magazines were "oriented" wished to have "their 'truck driver types' already cleaned up, showered, and ready for bed" (Ex. G, R. 89); he advised a photographer who furnished him with photographs for his magazines that the models were selected on the basis of their appeal to the intended audience, and that "it is absolutely essential that the models have pretty faces and a personality not totally unrelated to sex appeal" (*ibid.*).

Moreover, the calculated purpose of the magazines is fairly obvious from the publications themselves (Exs. 1–4). The experts testified that the models' poses, the props, the subject matter and the arrangement of the photographs were such as "could only be explained on the basis of appeal to homosexuals" (R. 8) and that "from all the data considered as a whole I would conclude that the intent of the publishers is to arouse prurient interest in the individual" (R. 36; see also, *e.g.*, R. 33). Petitioners offered no evidence to the contrary. They introduced no testimony concerning the intent or design of the magazines or to

the effect that they had any socially redeeming purpose.

There cannot, of course, be any substance to petitioners' contention (Pet. Brief, p. 27) that "the intent of the publisher is irrelevant." The publisher's intent is plainly relevant as a fruitful and reliable source of information concerning the predictable audience. And certainly the intent of the publisher should be taken into account in determining what the dominant theme of the material is, just as the legitimate literary or artistic purpose of the author or publisher is properly taken into account in determining whether the dominant theme of a work is literary or social, rather than pornographic. See, *e.g.*, *United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y.), affirmed, 72 F. 2d 705 (C.A. 2); *United States* v. *Dennett*, 39 F. 2d 564 (C.A. 2); *Consumer's Union of United States* v. *Walker*, 145 F. 2d 33 (C.A.D.C); compare *United States* v. *Rebhuhn*, 109 F. 2d 512 (C.A. 2), certiorari denied, 310 U.S. 629, and *Roth* v. *Goldman*, 172 F. 2d 788 (C.A. 2), certiorari denied, 337 U.S. 938.

The evidence that the actual audience of the magazines was made up of male homosexuals and some male adolescents, and that the magazine appealed to the prurient interest of these individuals, was essentially uncontradicted. One government expert testified that the magazines "would have a special appeal to * * * male homosexuals who have actually indulged in homosexual practices and who admittedly claimed they are homosexuals, but it also has a[n] appeal to young men, 18 years old, 17 years old who we might classify

as borderline sexual cases" (R. 10; see also R. 5, 7–8, 18, 19), and that for a "normal person" to read them would be "an exception" (R. 27). The testimony of the other government witness was to the same effect (R. 33–34, 36, 41). The government witnesses agreed that it was to the prurient interest of these individuals that the magazines would appeal and that they would stimulate practicing homosexuals to engage in overt homosexual activities and would have a tendency to induce borderline adolescents to become homosexual (see the Statement, pp. 7–9, *supra*).

The testimony of the petitioners' experts was not to the contrary. One of them testified that, while "pictures for the most part have little impact on most homosexuals," they would have impact "on those homosexuals who were frustrated and denied and could not obtain satisfaction" (R. 42); he also testified that "the average normal person" would not "be likely to buy the magazines" (R. 43) and that among those to whom the magazines would appeal would be "the youngster" (R. 45). This witness testified that "a child" would not "become a homosexual" by looking at these magazines (R. 43); and the other expert for the petitioners testified that a "young man * * * not predisposed to becoming a homosexual" would not change his "entire sexual orientation" and become a homosexual by viewing the pictures in these magazines (R. 51–52). Petitioners conceded in their complaint (R. 68) that "[t]he preponderance of the expert testimony showed that the magazines in question * * * would appeal to the prurient interest of homo-

sexuals"; and they submitted to the Judicial Officer as a proposed finding of fact "That all of the magazines in evidence * * * could and would appeal to the prurient interest of particularly susceptible persons such as homosexuals" (App. B, *infra*, p. 86).

Petitioners now attempt to contest the well-supported findings as to the intended and actual audience of the magazines by suggesting that the term "homosexual" is not definable (Pet. Brief, pp. 15–25, particularly p. 16).[25] However, the authorities relied on by petitioners accept and employ the term "homosexual," thus indicating that it has meaning and significance for them (Pet. Brief, pp. 16, 18, 20–21). And in the proceedings before the Judicial Officer, the experts on both sides used the term without objection or qualification (see, *e.g.*, R. 5, 34, 41, 52), and there was testimony that the publisher of petitioners' magazines had employed the term (R. 64). Indeed, as we have indicated, petitioners proposed a finding of fact (accepted by the Judicial Officer, R. 87) based on the term "homosexual" (App. B, *infra*, p. 86). Furthermore, the government's experts made relevant distinctions among the sub-groups within the general category of "homosexuals." Not only did they distinguish in their testimony among overt, practicing homosexuals (*e.g.*, R. 10), adolescents with latent homosexual tendencies (*e.g.*, *ibid.*) and homosexual deviants with sadistic or masochistic tendencies (*e.g.*, R. 12–13),

[25] Even if there were any merit to this contention, it would come too late, for it was not raised at the administrative level, in either court below, or in the petition for certiorari. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Hormel* v. *Helvering*, 312 U.S. 552, 556.

but they distinguished among the effects that the magazines would have on these different sub-groups (R. 10–11, 16, 19–20, 23, 34–35).

Finally, the evidence of record compelled the Judicial Officer to conclude that this appeal to the prurient interest of homosexuals was the dominant theme of the magazines and that they had no redeeming qualities. The government experts testified to the overwhelming extent to which material calculated to excite such interest predominated in these publications (R. 5, 9, 18, 34, 41), a conclusion that can be readily substantiated by an examination of the magazines themselves (Exs. 1–4). The government experts also testified as to the lack of any redeeming literary, scientific, educational or other values in the magazines (R. 8–9, 34). Petitioners suggest (Pet. Brief, pp. 9–15) that the dominant theme of the magazines is body-building or physical culture. The record will not support such an assertion. Not only is the expert testimony to the contrary, but petitioners introduced no testimony to the effect that physical culture, or any other legitimate subject, was the dominant theme of the magazines.[26] No one connected in any way with the magazines came forward to testify as to what their purpose was or that they were published with any bona fide intent to express ideas or to advocate a position or point of view. Compare *Roth* v. *United States*, 354 U.S. 476, with *Sunshine Book Co.* v. *Summerfield*,

[26] One of petitioners' experts "gathered" that one of the magazines "is primarily * * * a physical culture magazine" in intent (R. 44), although he disclaimed any special knowledge on that subject (*ibid.*).

355 U.S. 372, and *One, Inc.* v. *Oleson*, 355 U.S. 371. The magazines themselves disclose very little in the way of either text or pictures to suggest that body-building was to any significant extent a part of the magazines' appeal, nor do any of the advertisements offer athletic, weight-lifting or body-building equipment or literature.

Petitioners also suggest (somewhat inconsistently with their argument that the magazines were body-building magazines) that the pictures in the magazines should be considered as no more than the homosexual equivalent of pictures of scantily-clad "pin-up" girls (Pet. Brief, p. 27). First, this is based on the faulty premise that magazines consisting of photographs of nude or partially dressed women, designed to appeal to the prurient interest of the average man and having no redeeming social purpose, are entitled to First Amendment protection. There is no basis in the cases for such a contention; see, *e.g.*, *United States* v. *Oakley*, 290 F. 2d 517 (C.A. 6); *Harris* v. *United States*, 239 F. 2d 612 (C.A. 5); *Glanzman* v. *Schaffer*, 252 F. 2d 333 (C.A. 2), affirming 143 F. Supp. 243 (S.D.N.Y.), vacated with orders to dismiss as abated, 357 U.S. 347. See also *Volanski* v. *United States*, 246 F. 2d 842 (C.A. 6) (photographs of partially clad women could not be held to be not obscene as a matter of law). Second, the record in this case indicated that homosexuals are more easily stimulated to overt sexual activities than are normal persons with heterosexual outlooks (see pp. 8, 27, *supra*). Finally, it seems scarcely open to question that society has a legitimate interest (already expressed in the laws of the States) in preventing overt

homosexual activities while refusing to condemn comparable activities when indulged in on a heterosexual basis.

In short, the Judicial Officer and the two courts that affirmed his findings and conclusions were clearly correct in concluding, on considering the expert testimony and the magazines taken as a whole, that the dominant theme of the issues of *MANual, Trim* and *Grecian Guild Pictorial* in question was an appeal to the prurient sexual interest of the atypical persons who were its actual and intended audience.[27] On the basis of this finding, the Judicial Officer properly found petitioners' magazines to be obscene and, therefore, non-mailable (R. 87). There is no warrant for this Court to disturb those findings and conclusions, sustained by both courts below.

II. PETITIONERS' MAGAZINES WERE PROPERLY FOUND NON-MAILABLE AS CONTAINING INFORMATION FOR OBTAINING OBSCENE MATERIAL

In addition to holding the magazines themselves obscene, the Judicial Officer of the Post Office Department and the courts below found the magazines non-mailable because they contained information as to

[27] The magazines in this case are not only obscene under the standard for determining obscenity set forth by this Court in *Roth*, but are also obscene under the stricter definition of obscenity urged by those who believe that obscenity can be restrained only in cases where it presents a clear and present danger of illegal conduct. See *Roth* v. *United States*, 354 U.S. 507, 509–12 (dissenting opinions). For the evidence in the record in this case shows that the magazines have a direct impact upon their readers, stimulating and inducing them to engage in unlawful acts (R. 10–11, 19–20, 34–35; see also R. 86).

where, how, and from whom obscene matter could be obtained (R. 86, 87, 88, 92). This finding constitutes an additional and independent ground for the respondent's refusal to carry petitioners' magazines in the mail. 18 U.S.C. 1461; *Roth* v. *United States,* 354 U.S. 476.

Virtually every page of petitioners' magazines contained a photograph of a male model with the name of the photographer and model, and each magazine contained a directory containing the names and addresses of photographers whose pictures appeared in the magazine (Exs. 1–4). In addition, the magazines contained some formal advertisements for photographs of males, with such descriptions as "perfectly proportioned, handsome, male models, age 18–26" (*e.g.*, Ex. 2, p. 4). Postal inspectors and a private individual who testified at the administrative hearing obtained from photographers listed in the magazines photographs of nude male models displaying their genitals (Tr. 282, 285–88, 291, 323–39, 338–45; Exs. C, F, K, L, Q).

The photographs obtained from the photographers were plainly obscene (see *Collier* v. *United States,* 283 F. 2d 780 (C.A. 4), certiorari denied, 365 U.S. 833; *Womack* v. *United States,* 294 F. 2d 204, certiorari denied, 365 U.S. 859), and petitioners do not appear to contend otherwise (see Pet. Brief, pp. 30–32).[25]

[25] Of course, if petitioners' contention that obscenity must be judged in terms of its effect upon the average adult were accepted (Pet. Brief, p. 26), these photographs presumably could not be considered obscene, because they would not appeal to the prurient interest of the average man, and there was no evidence that they would appeal to the prurient interest of the average woman.

On the basis of the foregoing evidence, the Judicial Officer found that the male homosexual would find in the magazine information as to "the names and addresses where nude male pictures in poses and conditions which would appeal to his prurient interest may be obtained" (R. 86; see also R. 84, 87). This finding was affirmed by the court of appeals (R. 92).

In addition, the Judicial Officer found that the magazines contained information that would "lead to the procurement of so-called 'hard-core' pornographic material" (R. 87, see also R. 84–85)—namely, material consisting in large part of photographs of males engaged in various homosexual acts. Such photographs were seized at the places of business of photographers listed in the directories of petitioners' magazines (Tr. 33438; Exs. M and N; see also Ex. A). Petitioners concede that they were obscene (Pet. Brief, p. 31).[29] And the undisputed evidence was that dealers in photographs of male nudes sell such "hard core" photographs to those who have made repeated purchases of less offensive material (R. 57). The Judicial Officer was plainly justified in inferring that the listed photographers from whom the photographs were seized kept such photographs for sale to buyers who made repeated purchases of their less obscene material, and the court of appeals so held (R. 92).

Although not specifically challenging any of the foregoing, petitioners nevertheless challenge the conclusion (R. 87) that the magazines are non-mailable

[29] Adoption of petitioners' standard of obscenity, however, would require the conclusion that this "hard-core" pornography was not obscene. See note 28, *supra*, p. 46.

under 18 U.S.C. 1461 as "giving information, directly or indirectly, where, or how, or from whom, or by what means" obscene matter may be obtained. They argue, citing *Smith* v. *California*, 361 U.S. 147 (where this Court held that criminal liability could not attach to unknowing possession of obscene material), that they had no knowledge that the materials sold by the photographers listed in the directories were obscene (Pet. Brief, pp. 30–32). However, the record fully supports the Judicial Officer's express refusal[30] to find that petitioners had no knowledge as to the kind of material sold by the photographers listed in their directories.

There is abundant evidence that petitioners' president, Mr. Womack, was well aware of the kind of materials sold by the photographers listed in the magazines. He himself sold obscene photographs of nude men to homosexuals through the mails, under the trade name of Continental Artists (R. 55, 59; see also Ex. C).[31] Although Continental Artists did not advertise as such in the four magazines in issue here, Vulcan Studios was one of the photographers listed (Ex. 4, p. 44), and Mr. Womack, acting as Continental Artists, answered inquiries addressed to Vulcan Studios and sold the photographs requested (R. 59; see also R. 89). The photographs so sold were obscene (see Ex. C). Surely petitioners cannot

[30] His refusal so to find took the form of a rejection of petitioners' proposed finding (R. 87; see App. B, *infra*, p. 86).

[31] His criminal conviction for that offense was sustained in *Womack* v. *United States*, 294 F. 2d 204 (C.A.D.C.), certiorari denied, 365 U.S. 859. See note 6, *supra*, p. 11.

assert a lack of knowledge based on the fact that their president acted in one capacity in selling the photographs and in another capacity in listing himself (as Vulcan Studios) as a vendor of photographs.

In addition, in March and April 1959, approximately a year prior to the publication of these magazines, petitioners' president was warned by the postal authorities that a number of his advertisers were being prosecuted for mailing obscene matter, and that he might be violating the law by transmitting through the mails information as to where obscene material could be obtained (R. 53–54). Even if it is true, as petitioners contend (see R. 58), that Mr. Womack said he would stop carrying the names of any photographer *convicted* of such charges, the warning he received would seem to have put him on notice that sterner measures than that would be required in order for him to satisfy himself that he was not violating the law.

Furthermore, the oral and documentary evidence shows that Mr. Womack (with whose knowledge petitioners, of which he was president, are plainly chargeable) knew that petitioners' magazines were aimed at an audience of male homosexuals and were designed to appeal to and stimulate their erotic interests (Exs. G and P; R. 54, 57, 59, 64, 88–89). In his business correspondence Mr. Womack suggested the exchange of customer names among those in the business of purveying photographs of nude men, with the hope of compiling a master "sucker list" (Ex. P). Under the circumstances, there is no room for the suggestion that Mr. Womack was unaware of what

was being sold by his fellow dealers in materials pandering to the prurient interest of homosexuals.

Even apart from Mr. Womack's knowledge, there is ample evidence that petitioners must have known of the nature of the materials sold by the photographers listed in their directories. Three of the four magazines in issue contained an express representation that the editors were familiar with the work of the photographers listed in the index or directory, and all of them contained an endorsement of the photographers and a recommendation that the readers support the photographers by purchasing their product (Ex. 1, p. 44; Ex. 2, p. 44; Ex. 3, p. 41; Ex. 4, p. 44). Furthermore, the advertisements themselves were sufficient to put petitioners on notice that the advertisers were selling pornography and obscenity. These typically consisted of a photograph of a nude or scantily attired young man and clearly indicated that the photographs to be purchased were of young male models. Moreover, some of them, featuring a photograph of a nude male that had obviously been retouched to cover his genitals, would offer an "original print of this photo" (*e.g.*, Ex. 2, p. 41). As the expert testimony showed, the poses and adjectives employed were plainly designed to tempt the reader with the promise of sexual excitement by means of the photographs being sold (R. 18–19).

The undeniable evidence of petitioners' president's activities in the distribution of obscene material and of the knowledge he clearly had or with which he was properly chargeable, petitioners' representations of knowledge as to the photographers' work, and the

character of the advertisements themselves all lend weighty support to the Judicial Officer's determination that petitioners were aware that the photographers they listed were distributing obscene matter. That determination is further supported by the lack of testimony by Mr. Womack or by anyone else as to petitioners' innocence in this regard.

It is arguable that Congress did not intend that *scienter* on the part of the sender be a prerequisite to a declaration of the non-mailability of matter containing information as to where obscene material may be obtained. The non-mailability provisions of 18 U.S.C. 1461 contain no express requirement of knowledge, while by sharp contrast the criminal provisions of the same section provide that one must have used the mails in the proscribed ways "knowingly" before he may be criminally convicted. However, assuming the statute should be construed as calling for some measure of *scienter,* it must also call for a good-faith effort on the part of the mailer to insure that he is not disseminating information as to where obscenity may be obtained—especially when (as here) he is on notice of the very real possibility that he might be doing so. See *Smith* v. *California, supra,* 361 U.S. at 154. The record falls far short of establishing that petitioners or their president undertook such a good-faith effort. Even in the absence of the convincing evidence of their actual knowledge that photographers whose names and addresses they published were distributing obscene matter (see pp. 45–51, *supra*), petitioners and their president, Mr. Womack, would plainly be chargeable with knowledge of that fact,

which they could have determined upon even the most superficial investigation.

III. THE PROCEDURES FOLLOWED BY RESPONDENT DID NOT CONSTITUTE A PREVIOUS RESTRAINT ABRIDGING FREEDOM OF SPEECH OR OF THE PRESS

Petitioners complain generally of "an unconstitutional prior restraint" (Pet. Brief, pp. 32–35), without specifying whether the asserted vice lies in the particular actions taken by respondent's agents in this case, in the procedure provided by the Post Office Department's regulations for the handling of matter that may be obscene, in the statute itself, or in all three. In this point of our brief, we show that respondent's agents scrupulously followed the procedures established by the Post Office regulations, which provide for a fair and speedy determination of the mailability of each challenged article; that those regulations impose no restraint on distribution not required and authorized by statute; and that the Act of Congress itself does not impose or authorize a previous restraint abridging the freedom of speech or of the press guaranteed by the First Amendment to the Constitution.

A. THE PROCEDURES FOLLOWED IN THIS CASE WERE IN FULL COMPLIANCE WITH APPLICABLE POST OFFICE REGULATIONS

The Regulations of the Post Office Department impose upon the individual postmaster the duty to withhold from dispatch or delivery any matter of doubtful mailability and to send a sample or description of it to the General Counsel of the Post Office Department for instructions (39 C.F.R. 14.9; see App. A, *infra*,

pp. 84–85). The Department's Rules of Practice and Proceedings Relative to Mailability provide for procedures to determine mailability (39 C.F.R. 203; see App. A, *infra*, pp. 81–84).[32] The General Counsel is directed to give his opinion "[u]pon receipt" as to the mailability of the items. If he determines that they are not obscene, he is to issue instructions to the postmaster to proceed with their delivery, but if he believes they are obscene and non-mailable, he is directed to issue a complaint promptly, setting forth the basis for his belief. Upon the filing of the complaint, a hearing before a hearing examiner is scheduled, which must be held within 10 days of the date of the filing of the complaint. The hearing examiner's decision must be rendered within 5 days after the conclusion of the hearing.[33] That decision becomes the departmental decision unless the losing party takes an appeal to the Judicial Officer of the Department within 5 days. The rules encourage the parties to agree by stipulation on time-saving procedures.

Petitioners' magazines were placed in the mails on March 25, 1960. In accordance with these regulations, the postmaster at Alexandria, Virginia, who had doubts as to the mailability of the magazines, withheld them from dispatch and forwarded a sample

[32] These same regulations, which are applicable only "to cases where the matter offered for mailing shall be of substantial value or quantity," govern all proceedings to determine nonmailability, including obscenity. On December 31, 1961, they were modified in some details, 26 Fed. Reg. 12777.

[33] This requirement has recently been modified. See fn. 32, *supra*.

to the General Counsel of the Post Office Department (R. 80). The General Counsel was of the view that the magazines were obscene, and promptly notified petitioners of that fact by letters of April 5 and 7, 1960 (R. 80).[34] Petitioners thereupon requested a formal hearing under the Rules of Practice, and, on April 11, the Judicial Officer entered an order setting in motion the procedures for a formal hearing (*ibid.*).

The General Counsel filed his complaint on April 14, alleging the nonmailability of petitioners' magazines. Petitioners and respondent agreed by stipulation to procedures to expedite consideration and final determination of the mailability of the magazines (R. 81–82); among other things, it was agreed that the hearing should be held before the Judicial Officer in the first instance, rather than before a hearing examiner.[35] The hearing was held on April 21, 22 and 25, 1960 (R. 82). The burden of proof was on government counsel, and petitioners were accorded full rights of confrontation and cross-examination and ample opportunity to present evidence (see, generally, R. 2–65). The Judicial Officer rendered his decision on April 28, 1960, on the third day following the close

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[34] The General Counsel made a tentative determination that the items in dispute were not of substantial value or quantity (see pp. 3–4, *supra*) and therefore so notified the petitioners rather than issuing a complaint. Immediately upon receipt of petitioners' request for a hearing and assertion of the value and quantity of the items in dispute, however, the Judicial Officer determined that they were of substantial value and ordered the issuance of a complaint.

[35] The parties also stipulated that the determination in this proceeding would also govern another proceeding concerning *Fizeek* magazine (R. 81–82).

of the administrative record and 34 days after the magazines were initially deposited for mailing (R. 80).

With the exception of their request for a hearing, which was promptly granted,[36] petitioners made no objection at the administrative level to the procedure followed, and they took no exceptions.[37] Neither in the courts below nor here do they specify any way in which respondent's agents departed from the pertinent regulations, nor do they spell out any charges of irregularity or unfairness in the proceedings. Their attack is limited to the bald assertion that the procedure in this case amounted to an "ex parte administrative prior restraint" (Pet. Brief, p. 33) and were "no more than me arguing with myself over what I had already decided to do" (*ibid.*). The allegations of lack of a hearing and prejudgment implicit in these claims are wholly without foundation.

[36] There is, of course, no foundation for petitioners' assertion that they "forced the Post Office to hold a formal hearing * * * by obtaining a Temporary Restraining Order from the United States District Court for the District of Columbia" (Pet. Brief, p. 4). Petitioners' request for a hearing was received and granted on April 11, 1960, the same day on which petitioners sought and were granted, *ex parte*, a temporary restraining order which was stayed the following day at the request of respondent. Nothing in the record indicates that the Judicial Officer was motivated by, or was even aware of, the suit for judicial relief when he acted on the motion for a hearing.

[37] It would seem that the petitioners are therefore precluded from having any attack on the procedures employed considered by the courts. See *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

The only *ex parte* aspect of this proceeding was the General Counsel's decision to file a complaint, which was, of course, done in legitimate fulfillment of his prosecutorial function. Petitioner was granted a full adversary hearing, with all of the traditional rights to introduce evidence and to examine, confront and cross-examine witnesses. Petitioners do not, nor could they, cite any basis for suggesting that there was any prejudgment involved in the hearing they received. The authorized procedure for prosecution by the General Counsel and for adjudication by a hearing examiner (the necessity for which adjudication was waived by petitioners) and the Judicial Officer is in full compliance with the requirements of the Administrative Procedure Act for the separation of prosecutory and adjudicatory functions (5 U.S.C. 1004(c)) and for the conduct of hearings generally (5 U.S.C. 1006, 1007).[38] In the absence of the slightest evidence to the contrary, it must be assumed that these valid procedures were followed here.

B. THE POST OFFICE REGULATIONS APPLIED IN THIS CASE WERE AUTHORIZED AND REQUIRED BY ACT OF CONGRESS

As the foregoing section makes clear, the procedures for determining mailability, as authorized by the regulations and as they were implemented in this case, are eminently fair and unusually expeditious. Petitioner, however, contends that they constitute a "prior restraint," apparently because of the refusal of respondent's agents to convey in the mails or deliver

[38] Cf. Public Law 86-676, 74 Stat. 554 (1960).

petitioners' magazines while the proceeding to determine their mailability was pending.[39]

However, that refusal is clearly required by the unequivocal direction of the statute that obscene matter "* * * Is declared nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier" (18 U.S.C. 1461; see App. A, *infra*, p. 80). The regulations do nothing more than implement the congressional mandate that obscene materials shall not be carried in the mails. For if the magazines were conveyed through the mails and delivered while the administrative proceedings were going on, the proceedings would become moot. The time required to convey and deliver mail in this country is always less than the time required to hold a full and fair hearing with adequate notice. If, as petitioners apparently contend, the Post Office did not have authority to withhold material believed to be obscene from dispatch pending a decision on mailability, but were required to convey and deliver such material promptly, the Post Office could never comply with the express direction of Congress. The issue of the periodical in question would be delivered before it could be found obscene, and succeeding issues would

[39] We suggest that this issue is not properly in this case. It would have been properly presented had petitioners asserted it in the original suit they filed in April 1960, which was dismissed (see note 1, *supra*, p. 4). Petitioners took no appeal from that dismissal, and they did not institute the present action until a final administrative decision had been rendered (R. 66, 68). By that time, the question of power to withhold from the mails pending an administrative decision had been rendered moot.

have to be treated in the same way to avoid problems of prior restraint.[40] The barn could never be locked until after the horses were stolen. The Post Office Department would be required to violate the express statutory prohibition and to assist in the commission of the crime of mailing obscene matter.[41] That cannot be the law. If, as we believe, the section prohibiting the conveyance of obscene matter through the mails is constitutional,[42] it must require the Post Office to withhold matter deemed to be obscene from conveyance and delivery unless and until it is authoritatively determined not to be obscene.[43]

In our view, it is clear from the face of the statute that Congress intended the postal authorities to refuse to convey and deliver matter they believe to be obscene unless and until such matter is determined to be not obscene. However, in light of petitioners' apparent contention that the statute should somehow be construed to avoid that result (Pet. Brief, pp. 32–33), we show below that the legislative history, statutory framework and consistent administrative practice support the clear language and purpose of the statute, and require the respondent and his agents to refuse to convey or deliver obscene matter through the mails.

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[40] See pp. 67–69, *infra*.

[41] *Monart* v. *Christenberry*, 168 F. Supp. 654 (S.D.N.Y.).

[42] See pp. 65–79, *infra*.

[43] See also 39 U.S.C. 4001, formerly 39 U.S.C. 259, set forth in part at p. 61, *infra*.

1. The first statutory prohibition against admission of obscenity to the mails was Section 16 of the Act of March 3, 1865, 13 Stat. 507:

> SEC. 16. * * * [*N*]*o obscene book, pamphlet, picture, print, or other publication of a vulgar and indecent character, shall be admitted into the mails of the United States;* any person or persons who shall deposit or cause to be deposited, in any post-office or branch post-office of the United States, for mailing or for delivery, an obscene book, pamphlet, picture, print, or other publication, knowing the same to be of a vulgar and indecent character, shall be deemed guilty of a misdemeanor * * * [emphasis added].

Since the criminal offense was defined completely in the clause beginning "any person * * *," the italicized language would have been superfluous if only a criminal statute had been intended.

Moreover, the debates in the Senate show that in fact Congress designed the first clause to confer power on the Postmaster General to exclude obscenity from the mail. As reported in the Senate, the bill included the language quoted above and an additional clause, following the clause denying admission of obscenity to the mails, which provided "but all such obscene publications deposited in or received at any post office, or discovered in the mails, shall be seized and destroyed, or otherwise disposed of, as the Postmaster General shall direct" (Cong. Globe, 38th Cong., 2d Sess., 661). The provision was intended to give the postal officials authority to exclude obscene materials from the mails. As explained

by its sponsor (Senator Collamer), the bill had a two-fold effect (*ibid.*):

> The first part of it provides that if such [obscene] publications are in the mails the postmasters may take them out; and the latter part provides a penalty and a punishment and penalty for those who put them into the mails. * * *

Senator Reverdy Johnson of Maryland feared that the bill as reported would lead to the mailing of obscene matter in sealed envelopes, and that "the postmaster, whenever he suspects that the envelope contains anything which is obnoxious to objection [sic], will break the seal." He therefore moved to strike all the language of the bill except that defining the criminal offense. In response to this motion, Senator John Sherman of Ohio argued that "the legislative prohibition against carrying such matter *when it is known to the postmasters should be left.* Probably the second clause allowing him to open mail matter should be struck out * * *" (emphasis added). Senator Johnson thereupon modified his amendment to conform with Senator Sherman's suggestion, so that the bill as finally enacted permitted postmasters to refuse obscene matter admittance to the mails. (*Ibid.*)"

" The 1865 statute, 13 Stat. 504, 507, was reincorporated into Section 148 of the revised postal laws of 1872. 17 Stat. 302. In 1873, Section 148 was amended, 17 Stat. 599, and the same year was incorporated into the Revised Statutes, as Section 3893. R.S. 3893 was amended to substantially its present form in 1876, 19 Stat. 90, and was further amended in 1888, 25 Stat. 187. In 1909, it became Section 211 of the revised criminal code, 35 Stat. 1129, 1138. It was reenacted as Section 1461 of the criminal code (Title 18) in 1948, 62 Stat. 768, and amended again in 1955, 69 Stat. 183.

In 1879 Congress strengthened the prohibition against conveyance of obscenity through the mails by imposing upon each postmaster the duty of insuring that obscene materials and other matter declared nonmailable should not be delivered, even if it reached the post office of delivery. Act of March 3, 1879, 20 Stat. 360. This statute today reads (39 U.S.C. (Supp. II) 4001(b)[45]):

> * * * [*N*]*onmailable matter which reaches the office of delivery,* or which may be seized or detained for violation of law, *shall be disposed of as the Postmaster General directs.* [Emphasis added.]

Thus, between 1865 and 1880 Congress established a comprehensive statutory scheme directed to the postal authorities, requiring them to refuse to convey obscene matter through the mails or to deliver it. In recent years, Congress has given even greater authority to the postal officials to insure that the mails do not become a vehicle for the conveyance of obscenity.[46]

2. The congressional prohibition against the transmission of obscene materials in the mails is part of a consistent statutory pattern for excluding from the mails all matter that Congress has made it a crime

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[45] Its form was modified recently in the act codifying Title 39, P.L. 86–682, 74 Stat. 578 (Sept. 2, 1960).

[46] *E.g.*, 64 Stat. 451, 39 U.S.C. (Supp. II) 4006 (S. Rep. No. 2179, 81st Cong., 2d Sess.); 69 Stat. 183, 18 U.S.C. 1461, 1465 (S. Rep. No. 113, 84th Cong., 1st Sess.); 70 Stat. 699, 39 U.S.C. (Supp. II) 4007 (S. Rep. No. 2234, 84th Cong., 2d Sess.); 72 Stat. 962, 18 U.S.C. 1461, 1462 (S. Rep. No. 1839, and H. (Conf.) Rep. No. 2624, 85th Cong., 2d Sess.).

to mail. Explosives, poisons, disease germs, and intoxicating liquors are nonmailable (18 U.S.C. 1716); so are writings advocating treason, insurrection, or forcible resistance to the law (18 U.S.C. 1717); writings inciting to arson, murder, or assassination (18 U.S.C. 1715); foreign divorce information (18 U.S.C. 1714); and many other types of materials (39 U.S.C. (Supp. II) 4001(a)). It cannot be argued that the unequivocal declaration of the nonmailability of such things as explosives nevertheless permits them to be circulated in the mails until there can be a full-dress administrative proceeding to establish their objectionable character, and there is no reason for construing the nonmailability provision differently for obscenity than for the other matters declared to be nonmailable.[47] As Mr. Justice Brandeis observed in *Milwaukee Publishing Co.* v. *Burleson,* 255 U.S. 407, 418 (dissenting opinion):

> The scope of the Postmaster General's alleged authority is confessedly the same whether the reason for the nonmailable quality of the matter inserted in a newspaper is that it violates the Espionage Act, or the copyright laws, or that it is part of a scheme to defraud, or concerns lotteries, or is indecent, or is in any other respect matter which Congress has declared shall not be admitted to the mails.

We submit that the mandate from Congress is clear: if the matter is non-mailable, then it must be excluded from the mails; and from this it must inevitably follow that if there is doubt as to the mailability of the

[47] See 39 U.S.C. (Supp. II) 4001(a).

matter, it must be withheld from dispatch until a decision as to mailability can be reached, with due regard for both the purpose of Congress and the procedural rights of the sender.

3. The consistent administrative practice of the Post Office Department has been to refuse to carry matter deemed to be obscene unless and until such matter has been authoritatively determined to be mailable. The earliest postal regulations placed the burden of excluding obscenity and other non-mailable matter upon the local postmaster. See, *e.g.*, Postal Laws and Regulations, 1873 ed., Section 88;[48] Postal Laws and Regulations, 1887 ed., Section 527;[49] Postal Laws and Regulations, 1893 ed., Section 335;[50] 1 Ops. Asst. Atty. Gen. for the Post Office Dept. 41 (1873); 4 Ops. Asst. Atty. Gen. for the Post Office Dept. 389, 391 (1907). The present practice of referring questions as to the mailability of matter deemed to be obscene to a central authority was adopted in 1902.

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[48] Section 88, "All books, pamphlets, circulars, prints, &c., of an obscene, vulgar, or indecent character; * * * must be withdrawn from the mails by postmasters at either the office of mailing or the office of delivery."

[49] Section 527. "Postmasters are required to exclude from the mails all unmailable matter; but they are specially warned that they have no right to detain first class matter upon the mere suspicion that it contains anything forbidden to be sent in the mails."

"When matter manifestly obscene, or circulars concerning lotteries, are deposited for mailing, the postmaster should withdraw them, and send them with a full statement of the facts within his knowledge to the Dead-Letter Office. * * *"

[50] Section 335. "Postmasters Are Responsible for Admission of Improper Matter, and will exercise great care to exclude whatever is manifestly unmailable. * * *"

Postal Laws and Regulations, 1902 ed., Section 497. Postmasters continued to be responsible in the first instance for excluding obscenity offered for dispatch. Postal Laws and Regulations, 1902 ed., Section 573. The duty not to convey such matter through the mails while awaiting a determination as to mailability was expressly recognized in an opinion rendered shortly thereafter by the legal advisor to the Post Office Department. 4 Ops. Asst. Atty. Gen. for Post Office Dept. 741, 742 (1908).

This interpretation has been consistently followed by the Post Office Department under the various amendments and revisions of the basic prohibition against the conveyance of obscene matter in the mails.[51] That this administrative practice accords with the aim of Congress has been recognized in debate on the floor of the House (*e.g.*, 8 Cong. Rec. 697), in hearings before committees of Congress (*e.g.*, Hearings before the House Post Office and Civil Service Committee on H.R. 569, 83rd Cong., 2d Sess., pp. 32–33), and in committee reports (*e.g.*, S. Rep. No. 747, 52d Cong., 1st Sess.).

Since this administrative interpretation was adopted when the statute was new, was instituted by those charged with the responsibility of enforcing the law, has been consistently followed, and has the clear approval of Congress, it should not be overturned except for the most compelling reasons. See *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Associations*, 310 U.S. 534, 549; *Federal Housing Authority* v. *The Dar-*

[51] See notes 44 and 46, *supra*, pp. 60, 61.

lington, 358 U.S. 84, 90; *Federal Trade Commission* v. *Mandel Brothers,* 359 U.S. 385, 391. Not only are those reasons absent here, but in our view the administrative interpretation is the one required by the plain language and manifest purpose of the statute.

C. THE STATUTORY PROHIBITION AGAINST CONVEYING OBSCENE MATTER THROUGH THE MAILS DOES NOT IMPOSE AN UNCONSTITUTIONAL PREVIOUS RESTRAINT ON SPEECH OR THE PRESS

Petitioners have not directly challenged the constitutionality of the clause in 18 U.S.C. 1461 which forbids the conveyance through the mails and the delivery of obscene matter. Although they attack the procedures followed by respondent's agents as unconstitutional, they refer to the statute as one which "raises doubts of constitutionality" and is "of doubtful Constitutional validity" (Pet. Brief, pp. 32, 33). The same absence of a direct challenge is apparent in the petition for certiorari (Pet. 7–8). It is at least questionable whether the constitutionality of the statute was fairly encompassed in the questions presented in the petition. See the Revised Rules of this Court, Rule 15–1(c)(1).

Two other facts indicate that petitioners may have failed to preserve their rights to challenge the constitutionality of the statute itself. At the administrative hearing they did not in any way challenge the procedure followed by respondent.[52] More significant, perhaps, is the manner in which the case arose. Although petitioners sought an injunction requiring the conveyance of their magazines through

[52] See p. 55, *supra.*

the mails, they did not seek the three-judge court normally required by 28 U.S.C. 2284 in cases in which the challenge to administrative action is based upon the unconstitutionality of the statute itself, rather than of some administrative ruling. For these reasons, the Court may wish to refrain from deciding the constitutionality of the clause of 18 U.S.C. 1461 prohibiting the carrying of obscene matter through the mail."[33] For the remainder of this brief, however, we assume that the constitutional question has been properly preserved and presented to the Court.

In *Roth* v. *United States*, 354 U.S. 476, this Court determined that Congress has the authority, under the postal power delegated to it by Art. I, § 8, Cl. 7 of the Constitution, to prohibit the mailing of obscene matter and to prescribe appropriate punishment therefor. See also *Public Clearing House* v. *Coyne*, 194 U.S. 497, 506–08. We submit that the power of Congress to authorize the withholding of matter that may be obscene pending determination of its mailability is equally clear, and that it is beyond constitutional challenge because (1) such withholding does not constitute a previous restraint for the reason that the matter has already been published and can be distributed by means other than the mails; (2) whatever

[33] The long standing practice of this Court is, of course, to avoid the decision of delicate constitutional questions where possible. *E.g.*, *Greene* v. *McElroy*, 360 U.S. 474, 492–493; *United States* v. *UAW-CIO*, 352 U.S. 567; *United States* v. *C.I.O.*, 335 U.S. 106; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345–346 (concurring opinion of Brandeis, J.), and cases cited.

disability the withholding imposes is reasonable in relation to the overriding public interest, expressed by Act of Congress, in preventing the dissemination of obscenity; and (3) the constitutionality of the statute is supported by its unchallenged acceptance for almost one hundred years and by the rulings of this Court.

1. The First Amendment to the Constitution prohibits laws that abridge freedom of speech and freedom of the press. Although the Amendment makes no specific reference to prior or previous restraint, the conception of those freedoms held by the framers of the First Amendment was based upon the historic struggle in England directed against the system of censorship by licensing. Blackstone asserted that liberty of the press "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 Bl. Comm. 151–152. Madison may have been of the same view. See Madison's Report on the Virginia Resolutions, 4 Elliot's Debates 546. This Court has stated that the "main purpose" of the freedom of speech and of the press clauses was to prevent previous restraints. *Patterson* v. *Colorado*, 205 U.S. 454, 462. Of course, it seems clear that the First Amendment also prohibits subsequent punishment for constitutionally protected utterances.[54] Nor is the protection as to previous restraint absolutely unlimited.[55] Neverthe-

[54] *E.g.*, *Butler* v. *Michigan*, 352 U.S. 380; *Smith* v. *California*, 361 U.S. 147. See 2 Cooley, *Constutional Limitations* (8th ed.) 815.

[55] *E.g.*, *Near* v. *Minnesota*, 283 U.S. 697, 715–716; *Times Film Corp.* v. *Chicago*, 365 U.S. 43; *Schenck* v. *United States*, 249 U.S. 47; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439; *Dennis* v. *United States*, 341 U.S. 494.

less, the distinction between previous restraint and subsequent punishment apparently retains vitality, in the sense that a previous restraint is to be scrutinized more carefully to see whether it offends against the historic conception of the freedoms of speech and of the press embodied in the First Amendment.

A restraint is previous, rather than subsequent, when, like the hated power of the licensor in Sixteenth and early Seventeenth-Century England, it prevents the publication of material. 4 Bl. Comm. 151–152.[56] Thus, in *Near* v. *Minnesota*, 283 U.S. 697, a procedure which placed a newspaper under injunction for future issues as well as those already published was held to be "of the essence of censorship," an unconstitutional previous restraint. 283 U.S. at 713, 710–720. By contrast, in *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, the procedure established by a New York statute for an injunction against the sale and distribution of obscene matter was upheld as constitutional, and not an illegal restraint (354 U.S. at 442):

> Criminal enforcement and the proceeding under § 22-a interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. * * *

[56] Blackstone said: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

The Court distinguished *Near* v. *Minnesota*, *supra*, on the ground, *inter alia*, that unlike the Minnesota statute the New York procedure "studiously withholds restraint upon matters not already published" 354 U.S. at 445.

The rationale behind this important distinction is not difficult to perceive. The premise of the First Amendment protection is that man is not to be inhibited in the development of his ideas. The process through which the author goes in articulating his ideas to the point where he is prepared to share them, either by speech or the written word, with the world at large is often the most important phase of their maturation. Hence, he must not ordinarily be stopped short of what marks the terminal point in their development: publication. This, too, for the additional and equally important reason that it is only upon or after publication that even the most obnoxious products of the minds of men are capable of working sufficient public harm to warrant their control.

Like the procedure in the *Kingsley Books* case, *supra*, and unlike that in *Near* v. *Minnesota*, the statute here (18 U.S.C. 1461) affects only matter that has already been printed and published. The order of respondent likewise goes only to the issues of petitioners' magazines that have been printed and published (R. 88). Since the statute prohibits only the transmission of obscene matter, it could not be construed to apply to future issues.

In determining whether a procedure constitutes an unlawful previous restraint, the governing consideration is "the operation and effect of the statute in sub-

stance." *Near* v. *Minnesota*, 283 U.S. 697, 713; *Kingsley Books* v. *Brown*, 354 U.S. 436, 441–442; see also *Marcus* v. *Search Warrant*, 367 U.S. 717, 736–737. Analyzed in terms of substance, rather than form, it is clear that the procedure prescribed by 18 U.S.C. 1461 does not amount to such a previous restraint. As noted above, the refusal to carry the matter through the mails is made only after publication. And the refusal to carry the materials does not constitute a full "restraint." For example, that refusal imposes little disability in the intra-state circulation and distribution of the material by the publisher, and it leaves him free to circulate and distribute the material among the States by other means of transportation, subject of course to the possibility of criminal prosecution,[11] which is present regardless of respondent's refusal. The restraint imposed by this provision is considerably less drastic than that involved in the *in rem* proceedings authorized by the Customs Act, 19 U.S.C. 1305(a). Yet the constitutionality of that provision, which has been in effect since 1842 (5 Stat. 566–567), has never to our knowledge been questioned.

The limited effect of a postal refusal to convey matter through the mails is demonstrated by the record in this case. Of the claimed circulation of 25,000 copies for each issue of petitioners' magazines, less than half (12,000) were distributed through the mails (R. 66–67). The remainder, presumably those sold within the District of Columbia or distributed by

[11] 18 U.S.C. 1462, 1463, 1465.

carrier, were unaffected by any decision as to the mailability of the magazines. And of the 12,000 copies of each magazine distributed through the mails, fewer than 1,000 were mailed to individual subscribers, with the remainder sent in lots to distributors (R. 71). And, of course, as to the 375 copies of petitioners' magazines that were actually denied access to the use of the mails, petitioner was free to withdraw them from the post office, and to transport them by some other means [58] (see Pet. Brief, p. 34; 39 C.F.R. 203.5, App. A, *infra*, p. 82).

Respondent's refusal to convey the magazines through the mails imposed much less of an actual restraint than that upheld in *Kingsley Books* v. *Brown*, 354 U.S. 436. In that case the statutory procedure, which this Court upheld, permitted an injunction *pendente lite* against the sale and distribution of the articles in issue. Under the statute in this case, petitioners were free from the hazards of contempt proceedings to continue to circulate, distribute and sell their magazines both intrastate and interstate while the determination as to obscenity was being made. Indeed, insofar as appears from the record, petitioners could in the interim have withdrawn almost all of the copies of the issues they had deposited, and still obtain a ruling as to mailability. At most, then, petitioners suffered a minor economic loss as a result of the refusal to carry their magazines through the mails while the proceedings were pend-

[58] Subject, of course, to the possibility of criminal prosecution.

ing. There was, in short, no full or prohibitory restraint on the circulation of the magazines.[59]

2. At least since *Roth* v. *United States*, 354 U.S. 476, 485, it has been settled that obscenity, like epithets, libelous utterances and fraudulent representations, is not speech within the meaning and protection of the First Amendment.[60] It follows that even a previous restraint does not violate that Amendment if it is directed to obscene matter. *Times Film Corp.* v. *Chicago*, 365 U.S. 43. The obscenity of the particular materials which respondent refused to convey through the mails does not end the matter, however. A statute may be deemed an abridgement of free speech if, in its attempt to suppress constitutionally unprotected utterances such as obscenity, it inhibits the free flow of non-obscene literature by failing to provide adequate safeguards for the constitutionally protected material. *Smith* v. *California*, 361 U.S. 147; *Marcus* v. *Search Warrant*, 367 U.S. 717.

The statute in issue here has no such infirmity. As supplemented by the regulations, the Act provides for a speedy determination as to the obscenity *vel*

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[59] Petitioners' contention that the length of the proceeding to determine mailability renders monthly magazines obsolete (Pet. Brief, p. 34) has no applicability to this case, at least. The magazines petitioners deposited for mailing on March 25 were the March and May issues of one magazine, the April issue of another and the May issue of the third (Exs. 1–4); apparently petitioners' readers make few demands with respect to currency. Moreover, there was nothing pertaining to current events in any of the magazines; indeed, the only thing that could possibly date the magazines was the designation of month and year on the cover.

[60] See p. 21, incl. note 8, *supra*.

non of each item presented for mailing (see pp. 52–56, *infra*). The initial decision as to mailability is made by persons trained in the law and familiar with the decisions of this Court and the lower courts (39 C.F.R. 203.2). Contrast *Marcus* v. *Search Warrant, supra,* 367 U.S. at 732, 735. The administrative determination is rendered by an impartial adjudicatory officer after a full hearing with ample opportunity for the presentation of expert and lay testimony and for confrontation and cross-examination. There are strict time limits governing each stage of the administrative proceedings, which are conducted with the utmost speed compatible with the requirements of notice and fair hearing (39 C.F.R. 203.2, .4, .6, .8, .10, .11, and .13). Contrast *Marcus* v. *Search Warrant, supra,* 367 U.S. at 735, 737. At any time during the proceedings, the mailer is free to distribute other copies of his publication and may even withdraw the matter submitted for mailing in order to distribute it in other ways. The order is limited to the specific item found to be non-mailable. Contrast *Marcus* v. *Search Warrant, supra,* 367 U.S. at 735, 736. Furthermore, any error made at the administrative level is subject to correction by the courts. 5 U.S.C. 1009.[51]

[51] It should be noted that, as the definition of obscenity in 18 U.S.C. 1461 is the same for both the civil and criminal provisions, the postal officials have the authority to exclude from the mails only material that would sustain a conviction under the criminal provisions of that statute for their knowing deposit in the mails. As the record in this case shows (see pp. 36*ff*, 52–56, *supra*), the statute and regulatory procedure under 18 U.S.C. 1461 allow for judging the materials in context, giving due consideration to the intent of the parties. In this respect,

Moreover, there is no federal constitutional infirmity in 18 U.S.C. 1461 in the fact that the determination of obscenity is made by an administrative official rather than by a jury. No criminal prosecution is involved. There is no substitution of punishment by contempt for punishment by jury trial. Accordingly, there is no question of a right to a trial by jury under the Sixth Amendment. Nor is there any suit "at common law" calling for a jury under the Seventh Amendment.[62] At stake is only the refusal, based upon an express statutory mandate, to transmit obscenity through the mail. That refusal must in the nature of things be made first by an administrative official, subject to review by the courts.[63] The Constitution does not provide otherwise.[64]

We submit that this statute and this procedure are entirely constitutional, judged by the prior decisions of this Court, notably the *Marcus* case, *supra*, and the *Kingsley Books* case, see pp. 71, 73, *supra*. The minor disabilities they impose upon would-be users of the mails (and, as we have shown, pp. 70–72, *supra*, those disabilities are slight) are reasonable even when considered alone, but are especially so in relation to the

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the statute and procedure here are more clearly constitutional than those sustained by this Court in *Kingsley Books* v. *Brown*, 354 U.S. 436. Compare 354 U.S. at 445–47 (dissenting opinions of Warren, C. J., and Douglas, J.).

[62] Petitioners have never asked for a trial by jury, and make no assertion here of the right to a jury determination.

[63] The question of the scope of judicial review is not presented by the record here. See *supra*, p. 38.

[64] *Glanzman* v. *Schaffer*, 252 F. 2d 333 (C.A. 2), judgment vacated with orders to dismiss as abated, 357 U.S. 347.

legitimate public interest in prohibiting the distribution of obscene materials. It is not too much to ask of those who would distribute matter that is at best on the .derline of obscenity that they undergo a relatively short delay in the use of the mails (although they are free to use other methods of distribution) in order to obtain a definitive ruling as to the mailability of the challenged matter.

3. As we have noted (see pp. 59–61, *supra*), the civil provisions of 18 U.S.C. 1461 involved here are as venerable as the criminal provisions of that section, whose constitutionality was upheld in *Roth* v. *United States*, 354 U.S. 476. First enacted in 1865, they have remained in force continuously since that time. Although the postal authorities consistently refused to convey obscene matter in the mails, until recent years the constitutionality of the statute was always assumed and never challenged.

A succession of decisions by this Court upholding the congressional authority to exclude matter from the mails confirmed the general understanding. See, *e.g.*, *Ex parte Jackson*, 96 U.S. 727 (circular concerning lotteries); *In re Rapier*, 143 U.S. 110; *Horner* v. *United States*, 143 U.S. 207 (lottery circular); *Public Clearing House* v. *Coyne*, 194 U.S. 497 (fraud order). In the last-named case, the Court noted (194 U.S. at 508):

> For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The consti-

> tutionality of this law we believe has never been attacked * * *.

By the time of this Court's decision in *Milwaukee Publishing Co.* v. *Burleson*, 255 U.S. 407, the law seemed so well established that the Court referred to the congressional authority over the mails as "practically plenary." 255 U.S. at 411. Mr. Justice Brandeis, while dissenting from the Court's decision, referred no fewer than four times in his opinion to the authority of Congress to exclude obscene and immoral matter from the mail. 255 U.S. at 418, 421, 422, 430. He pointed out (255 U.S. at 421):

> As a matter of administration the Postmaster General, through his subordinates, rejects matter offered for mailing, or removes matter already in the mail, which in his judgment is unmailable. *The existence in the Postmaster General of the power to do this cannot be doubted.* The only question which can arise is whether in the individual case the power has been illegally exercised. * * * [Emphasis added.]

In 1947, a renowned scholar, noted for his championship of the freedoms of speech and of the press, appraised the constitutionality of 18 U.S.C. 1461 in the following terms (Chafee, *Government and Mass Communications*, p. 282):

> The effect of the First Amendment and freedom of the press upon the administrative mechanism of the Post Office is more important practically than their effect on the postal power of Congress. Questions of the uncon-

> stitutionality of legislation are somewhat remote from reality, because the existing postal statutes, if properly construed, seem to fall within the valid powers of Congress. * * *

This Court's reaffirmation, in *Donaldson* v. *Read Magazine*, 333 U.S. 178, of the congressional authority to deny use of the mails to those who use them to conduct fraudulent enterprises supported the general view of the constitutionality of 18 U.S.C. 1461.[65] It is difficult, of course, to see why the "merchants of obscenity" who pander to the prurient are any more entitled to use the mails to further the conduct of their business than those who would use the mails to conduct fraudulent businesses. See *Milwaukee Publishing Co.* v. *Burleson, supra*, 255 U.S. at 418 (dissenting opinion of Brandeis, J.).

Not until 1949 was the constitutionality of the administrative provisions of 18 U.S.C. 1461 seriously questioned by any judicial authority.[66] *Roth* v. *Goldman*, 172 F. 2d 788, 790-91 (C.A. 2) (concurring opin-

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[65] Although in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146, the Court ruled that Congress had granted only limited authority to the Postmaster General to refuse second-class mailing permits, no doubt was cast upon the congressional authority to exclude obscene matter from the mails.

[66] In *Walker* v. *Popenoe*, 149 F. 2d 511 (C.A.D.C.), Judge Arnold expressed doubt as to the constitutionality of barring a pamphlet from the mails, without a hearing, on the ground of obscenity; it is not clear whether his doubts extended to a refusal to carry pending a prompt hearing. See 149 F. 2d at 513-14.

ion), certiorari denied, 337 U.S. 939 (~~concurring opinion~~). And even Judge Frank, who raised the constitutional doubts,[67] concurred in the decision upholding the refusal of the postal authorities to convey the obscene matter through the mails. Thus, the constitutionality of the provisions of the statute forbidding transmission of obscene matter through the mails appears to have been universally conceded for the first 84 years of its existence.

Since that time, the authority of the postal officials, based upon 18 U.S.C. 1461, has been sustained by every court in which that authority has been challenged. *Sunshine Book Co.* v. *Summerfield,* 249 F. 2d 114 (C.A.D.C.), reversed on other grounds, 355 U.S. 372; *One, Inc.* v. *Olesen,* 241 F. 2d 722 (C.A. 9), reversed on other grounds, 355 U.S. 371; *Monart* v. *Christenberry,* 168 F. Supp. 654 (S.D.N.Y.); *Glanzman* v. *Christenberry,* 175 F. Supp. 485 (S.D.N.Y.); *Poss* v. *Christenberry,* 179 F. 2d 411 (S.D.N.Y.); accord, *Klaw* v. *Schaffer,* 251 F. 2d 615 (C.A. 2), ordered dismissed as abated, 357 U.S. 346;[68] *Glanzman* v. *Schaffer,* 252 F.

[67] The doubts were addressed primarily, but not exclusively, to the standards for determining obscenity, the test on judicial review, and the necessity for showing a clear and present danger that the obscenity would result in unlawful conduct. 172 F. 2d at 790–798.

[68] *Klaw* v. *Schaffer, supra,* involved the validity of a stop order under 39 U.S.C. 259a (now 39 U.S.C. Supp. II 4006). The District of Columbia Circuit had held similar stop orders too broad. *Summerfield* v. *Sunshine Book Co.,* 221 F. 2d 42, certiorari denied, 349 U.S. 921; *Tourlanes Publishing Co.* v. *Summerfield,* 231 F. 2d 773, certiorari denied, 352 U.S. 912; *Oakley* v. *Summerfield,* 231 F. 2d 775, certiorari denied, *sub nom. Summerfield* v. *Tourlanes Publishing Co.,* 352 U.S. 912. The Post Office Department later provided by regulation for a narrower form of stop order. 23 Fed. Reg. 3740. *Glanzman* v. *Schaffer, supra,* also involved a stop order under 39 U.S.C. 259a.

2d 333 (C.A. 2), judgment vacated, 357 U.S. 347. The unanimity of judicial opinion for over four score years before any question was raised, and the uniform decisions of the lower federal courts since that time, provide persuasive support for the constitutionality of the statutory provisions excluding obscene matter from the mails pending a hearing as to its mailability and for the view that Congress can constitutionally forbid the use of the postal service as an instrument for the commission of the crime of transmitting obscene matter through the mails. *Monart* v. *Christenberry, supra.*

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted.

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APPENDIX A

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 1461 of Title 18, U.S.C., provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *
>
> * * * * *
>
> Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing

thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * *

Regulations of the Post Office Department, Rules of Practice and Proceedings, entitled Hearings on Mailability, 39 C.F.R. 203 (1961 Supp.), provide:

§ 203.1 *Limitation.*

The rules shall be applicable only to cases where the matter offered for mailing shall be of substantial value or quantity. The initial determination of this question by the General Counsel may be appealed to the Judicial Officer.

§ 203.2 *Initiation.*

Upon receipt of mail matter of doubtful mailability under the provisions of 18 U.S.C. 1302, 1461, 1463, 1717, or 1718 submitted by a postmaster pursuant to sec. 331.6 of the Postal Manual, the General Counsel shall: (a) file a complaint with the Docket Clerk of the Post Office Department or (b) instruct the postmaster to accept such matter for mailing.

§ 203.3 *Complaint.*

The complaint shall: (a) State statutory and or regulatory authority for withholding the matter from the mails; (b) specify the character or content of the matter which the complainant believes to be non-mailable; and (c) request the issuance of a notice of hearing by the Docket Clerk.

§ 203.4 *Notice of hearing; service.*

Upon receipt of the complaint the Docket Clerk shall issue a notice of hearing. The notice shall set the time and place for the hear-

ing and assign on rotation as far as practicable, a Hearing Examiner qualified pursuant to section 11 of the Administrative Procedure Act. The date set for the hearing shall be within ten days of the date of the filing of the complaint. The notice, together with copies of the complaint and these rules, shall be sent promptly to the Postmaster at the place of mailing to be served upon the mailer or his agent. A receipt therefor shall be obtained and forwarded immediately to the Docket Clerk. If personal service cannot be made, the notice of hearing shall be deposited in the mails for delivery in the regular course which shall constitute valid service. A report of such delivery shall be promptly forwarded to the Docket Clerk.

§ 203.5 *Compromise and informal dispositions.*

The mailer may request a conference with the complainant to consider informal disposition of any question of mailability or apply to the complainant for the withdrawal of the matter from the mails. When such a request is received, the scheduled hearing date will be postponed for such period of time as may be necessary but in no event longer than five days unless specifically requested by the mailer. If no agreement is reached, the proceeding shall promptly be re-scheduled for hearing.

§ 203.6 *Answer.*

The mailer may file an answer to the complaint and appear in person or by counsel at the hearing. The answer shall contain a reply to each allegation in the complaint and shall be filed in triplicate with the Docket Clerk in Room 5115, Post Office Department, Washington 25, D.C., at least three days prior to the date set for the hearing. Each allegation not answered shall be deemed admitted.

§ 203.7 *Default.*

If no answer to the complaint is filed, the mailer shall be deemed in default and the Judicial Officer shall instruct the postmaster of the disposition to be made of the matter in accordance with § 203.11. If the mailer files an answer but fails to appear at the hearing, the hearing examiner shall receive the evidence of the complainant and render an initial decision pursuant to § 203.10.

§ 203.8 *Hearing.*

Unless otherwise ordered by the Hearing Examiner, the hearing shall be held in Room 5241, Post Office Department, 12th and Pennsylvania Avenue NW., Washington 25, D.C., on the date set in the notice.

§ 203.9 *Proposed findings of fact.*

Either party may submit proposed findings of fact and conclusions of law orally or in writing at the conclusion of the hearing, unless the mailer requests an extension, which may be granted for a reasonable time.

§ 203.10 *Initial decision.*

Unless given orally at the conclusion of the hearing, the Hearing Examiner shall render an initial decision within five days of the conclusion of the hearing or of the receipt of the proposed findings if not submitted at the hearing. The initial decision shall become the departmental decision if an appeal is not perfected.

§ 203.11. *Appeal.*

Either party may file exceptions in a brief on appeal to the Judicial Officer within five days after the initial decision unless additional time is requested by the mailer. A reply brief may be filed within five days after the receipt of the appeal brief by the Docket Clerk.

§ 203.12 *Departmental decision.*

The Judicial Officer shall render a departmental decision or refer the matter to the Postmaster General for decision. The decision shall be served upon the parties and the postmaster.

§ 203.13 *Expedition.*

For the purposes of expedition the parties may, with the concurrence of the Judicial Officer, agree to waive any of these procedures.

§ 203.14 *Disposition.*

Matter found to be nonmailable shall be held at the post office where detained for a period of fifteen days, unless extended by the Judicial Officer, from the date of the departmental decision. During that time the mailer may make application for the withdrawal of the matter. The Judicial Officer shall order the matter returned to the mailer or otherwise disposed of in accordance with 39 U.S.C. 258.

The Regulations of the Post Office Department on Non-mailable matter, 39 C.F.R. (1961 Supp.) 14, provide in pertinent part:

§ 14.4 *Obscene and indecent matter.*

(a) *Lewd or filthy matter.* Obscene, lewd, lascivious, or filthy publications or writings, or mail containing information concerning where, how, or from whom such may be obtained, and matter which is otherwise mailable but which has on its wrapper or envelope any indecent, lewd, lascivious, or obscene writing or printing. Any mail containing any filthy, vile, or indecent thing.

§ 14.9 *Opinions on mailability.*

Postmasters and other employees at post offices shall not give opinions to the public concerning the mailability of matter under §§ 14.4,

14.5, 14.6, 14.7, 14.8 and §§ 15.5 and 15.6 of this chapter. When there is doubt as to the mailability of any such matter, the postmaster shall withhold it from dispatch or delivery and a sample or a complete statement of the facts shall be submitted to the General Counsel for instructions.

APPENDIX B

POST OFFICE DEPARTMENT
WASHINGTON, D.C.

In the Matters Concerning
MANUAL ENTERPRISES, INC., ET AL., and FIZEEK ENTERPRISES, INC.

P.O.D. Docket No. 1/246. P.O.D. Docket No. 1/235

MAILERS PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact:

1. That all of the magazines in evidence, exhibits one through eleven, do not have as their dominant theme an appeal to the prurient interest of the average person, applying contemporary community standards.

2. That all of the magazines in evidence, exhibits one through eleven, could and would appeal to the prurient interest of particularly susceptible persons such as homosexuals.

3. The publishers of each of the magazines in evidence, exhibits one through eleven, had no personal knowledge of the material sold by the advertisers whose advertisements are carried in all of the magazines in evidence, exhibits one through eleven.

Conclusions of law:

1. The magazines in evidence, exhibits one through eleven, by content are not obscene and are mailable.

2. The magazines in evidence, exhibits one through eleven, do not contain advertisements as to where, or how, or from whom obscene material may be obtained and are mailable.

Respectfully submitted.

STANLEY M. DIETZ,
Attorney for Mailers.

U.S. GOVERNMENT PRINTING OFFICE 1967